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Supreme Court, U.S.  
FILED

No. 08- — 08 962 JAN 27 2009

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**Supreme Court of the United States**

CENTRAL STATES, SOUTHEAST AND  
SOUTHWEST AREAS PENSION FUND AND  
HOWARD MCDUGALL, TRUSTEE,  
*Petitioners,*

v.

GENERAL MATERIALS, INC.,  
D/B/A WHOLESALE MATERIALS CO.,  
A MICHIGAN CORPORATION,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit

**PETITION FOR A WRIT OF CERTIORARI**

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PENSION FUND AND  
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## QUESTIONS PRESENTED

1. Whether the Court of Appeals committed an error by disregarding this Court's determination in *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985), that the decisions of the Trustees, such as their decision in this case that the Participation Agreement they drafted obligates an employer to remit contributions until 2005 even though the collective bargaining agreement had terminated in 1993, must be reviewed under the deferential arbitrary or capricious standard.

2. Whether the Court of Appeals committed error by ignoring the conflicting holding of the Seventh Circuit in *Central States Pension Fund v. Schilli Corp.*, 420 F. 3d 663 (7th Cir. 2005), which established that the Trustees' Participation Agreement does require contributions after collective bargaining agreement termination.

The decision of the Sixth Circuit has had a catastrophic impact on the two employees who had contributions paid on their behalf during the period of 1994 to 2005: one employee has had his pension benefit reduced by 75% and is now liable for a \$250,000 overpayment to the Fund and the other employee faces a 58% benefit reduction when he retires. The decision below also has broad implications for multiemployer pension plans across the nation because it exposes thousands of pensioners to a risk of similar disruptions in what they perceived as secure retirement income.

**RULE 14.1(b) AND 29.6 STATEMENT**

The following are the parties to the proceeding in the Court of Appeals for the Sixth Circuit:

1. Central States, Southeast and Southwest Areas Pension Fund, plaintiff-appellant; and
2. Howard McDougall, trustee of Central States, Southeast and Southwest Areas Pension Fund, plaintiff-appellant.
3. General Materials, Inc., d/b/a Wholesale Materials Co., a Michigan corporation, defendant-appellee.

The Central States, Southeast and Southwest Areas Pension Fund is a multiemployer trust fund and is not a corporation.

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CENTRAL STATES, SOUTHEAST AND  
SOUTHWEST AREAS PENSION FUND AND  
HOWARD MCDUGALL, TRUSTEE,  
*Petitioners,*

v.

GENERAL MATERIALS, INC.,  
D/B/A WHOLESALE MATERIALS CO.,  
A MICHIGAN CORPORATION,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit**

---

**PETITION FOR A WRIT OF CERTIORARI**

The Central States Southeast and Southwest Areas Pension Fund and Howard McDougall, Trustee respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

**OPINIONS BELOW**

The opinion of the court of appeals affirming the judgment in favor of the defendant (App., *infra*, 1a) is reported at 535 F.3d 506. The order of the court of appeals denying rehearing and rehearing *en banc*

(App., *infra*, 10a) is unreported. The district court's opinion denying petitioners' motion for summary judgment and granting respondent's motion for summary judgment is unreported (App., *infra*, 12a).

### **JURISDICTION**

The judgment of the court of appeals was entered on July 30, 2008. (App., *infra*, 1a.) A petition for rehearing and rehearing *en banc* was denied on October 29, 2008. App., *infra*, 10a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **STATUTORY PROVISION INVOLVED**

Section 515 of ERISA, 29 U.S.C. § 1145, provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

### **STATEMENT OF THE CASE**

This is a suit filed by the Central States Southeast and Southwest Areas Pension Fund ("Central States") and its trustee Howard McDougall to enforce the duty of General Materials, Inc. d/b/a Wholesale Materials Co. ("General") under section 515 of the Employee Retirement Income Security Act ("ERISA") "to make . . . [pension] contributions in accordance with the terms and conditions of . . . [the] plan or . . . [the collective bargaining] agreement" 29 U.S.C. §1145. Federal jurisdiction exists over the complaint under 29 U.S.C. § 1132(e)(1).

Central States currently receives contributions from approximately 2,500 employers located primar-

ily in 30 states located in the central, southeast and southwest regions of the United States. Central States has approximately 300,000 active participants and retirees.<sup>1</sup>

The last collective bargaining agreement (the "CBA") between Local 164 of the International Brotherhood of Teamsters ("Local 164") and General obligated General to contribute to Central States on behalf of "each employee covered by this Agreement." This case was filed after Central States learned through an audit that General had not remitted contributions on all employees performing work covered by the CBA. General refused to pay because it claimed that Local 164 had orally agreed in the mid-1990s that General would not be required to contribute to Central States on any of its new hires. Later, General claimed it was not required to pay on anyone after 1993 because the CBA had terminated and it filed a counterclaim where it sought to recover the contributions it had paid to Central States after 1993.

The duration clause of the CBA provided that the "Agreement will remain in full force and effect from January 1, 1991, to and including December 31, 1993 and shall continue in full force and effect from year-to-year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration" (the "Evergreen Clause"). General served a timely written termination notice in

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<sup>1</sup> In *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 561 n.1 (1985) this Court noted that Central States and the Central States, Southeast and Southwest Areas Health and Welfare Fund had more than 13,000 employers and served more than 500,000 covered employees.

1993, so the CBA terminated on December 31, 1993. However, it is undisputed that neither General nor Local 164 advised Central States of the termination of the CBA at any time before Central States began the payroll audit in 2004 that revealed the non-payment of contributions on new hires. To the contrary, in response to Central States' inquiries, Local 164 advised Central States in 2000, 2002 and 2004 that the CBA was continuing from year-to-year under the Evergreen Clause and neither General nor Local 164 responded to a 2001 letter from Central States indicating that Central States assumed the CBA was still in effect under the Evergreen Clause.

General also remitted contributions to Central States after December 31, 1993 on behalf of James Smith ("Smith") until he retired in January 1995 and on behalf of Roy Swihart ("Swihart") through September 2005. These payments were made in accordance with monthly bills containing a certification clause that required General to "reaffirm [its] obligation to make contributions required by the collective bargaining agreement" (the "Certification Clause"). The Office Manager/Controller of General testified that he believed General accepted the Certification Clause with each monthly payment from 1994 to 2005.

At the time the CBA was signed, General and Local 164 also signed a Participation Agreement (the "PA") drafted by Central States that required General to contribute to the Fund. The duration clause of the PA provided:

This Agreement shall continue in full force and effect until such time as the Employer notifies the Fund(s) by certified mail (with a copy to the Local Union) that the Employer is no longer un-

der a legal duty to make contributions to the Fund(s). The Employer shall set forth in the required written notice to the Fund(s) the specific basis upon which the Employer is relying in terminating its obligation to make contributions to the Fund(s). The Employer expressly agrees and hereby acknowledges by the signing of this Agreement that its obligation to make contributions to the Fund(s) shall continue until the above-mentioned written notice is received by the Fund(s) and the Trustees acknowledge the Employer's termination in writing.

(App. 43a, ¶ 7.) It was undisputed that no written notice of termination was provided to Central States by General until November 2, 2005. Instead, General continued to remit monthly contributions to Central States in accordance with the monthly bills containing the Certification Clause.

The dispute resolution clause of the PA indicates that "any and all disputes arising between the Employer and the Fun[d] . . . as it relates to the Employer's obligations to submit contributions to the Fun[d] shall be submitted for resolution to the Trustees of the Fund." (App. 47a, ¶14). The Trust Agreement incorporated into the CBA and the PA also requires that "all questions or controversies," and contribution refund requests must be submitted to the Trustees, and indicates that "the Trustees are vested with discretionary and final authority in making all such decisions . . . [which] shall be binding upon all persons dealing with the Fund." The dispute concerning General's duty to contribute after 1993 and its request for the refund of the contributions paid from 1993 through 2005 were submitted to the Trustees for resolution. The Trustees unanimously

determined that General was obligated to contribute to Central States from 1994 until 2005 because i) the required written notice to terminate the PA had not been served and, ii) General reaffirmed its obligation to contribute under the CBA by remitting contributions each month in accordance with the Certification Clause (App. 38a-40a).

As a result of the contributions paid after 1993, Smith was able to cross a very significant 30-years of service threshold that enabled him to quadruple the monthly pension benefit he began receiving in January 1995 from nearly \$500 to \$2,000. ERISA and the Labor Management Relations Act ("LMRA") prohibit the Trustees from paying pension benefits to employees based upon contributions that were not required by a written agreement. 29 U.S.C. §§ 186(c)(5), 1102(a)(1) and 1104(a)(1)(d). The Sixth Circuit's determination that the contributions paid after 1993 were not owed means that Smith has only 29 years of credit. As a result of the Sixth Circuit's decision, Smith's monthly benefit has now been reduced from \$2,000 to almost \$500 and he has been notified that he has accrued an overpayment of nearly \$250,000 since his retirement that he must repay to Central States. Further, 54-year old Swihart will have his benefit reduced by 58% from \$1,681 to \$706 when he ultimately retires.

## REASONS FOR GRANTING THE WRIT

### I. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DETERMINATION THAT THE TRUSTEES' DECISION MUST BE REVIEWED UNDER THE ARBITRARY OR CAPRICIOUS STANDARD OF REVIEW.

In *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989), this Court held that the decisions of an ERISA fund trustee must be reviewed under the deferential arbitrary or capricious standard if the applicable trust documents give the trustees discretionary authority to interpret plan provisions and resolve disputes. The PA indicates that General "assent[s] to . . . all of the actions of the Trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted" and provides that "any and all disputes arising between the Employer and the Fund(s) concerning the application and/or interpretation of the collective bargaining agreement's provision for contributions to . . . [the] Fund; this Participation Agreement; or the Fund's Trust Agreement as it relates to the Employer's obligations to submit contributions to the Fund(s) shall be submitted for resolution to the Trustees of the Fund." (App. 48a.) Further, the Trust Agreement provides that "all questions or controversies," and all contribution refund requests must be submitted to the Trustees, and indicates that "the Trustees are vested with discretionary and final authority in making all such decisions . . . [which] shall be binding upon all persons dealing with the Fund." In *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 n.8 (1985), this Court held that the Trustees' interpretation of Central States' plan

documents is entitled to "significant weight" based upon the very same provisions of the Trust Agreement and the PA.

Based upon the Trust Agreement and the PA, the district court determined "that the arbitrary and capricious standard [of review] applies to the Trustees' decision that General owed contributions from 1993 as well as the Trustees' denial of General's request for a refund." (App. 17a). However, the Sixth Circuit completely ignored the Trustees' decision and determined *de novo* what it believed to be meaning of the PA and Trust Agreement created by the Trustees. The Sixth Circuit's determination was in error because the Sixth Circuit failed to discuss the duration clause of the PA that was critical to the Trustees' decision. Further, the Sixth Circuit failed to even mention the numerous decisions of the courts in the Seventh Circuit (discussed in part II, *infra*.) which establish that the PA survived termination of the CBA even if the collective bargaining relationship has ended, even though these decisions were explicitly relied upon by the Trustees (App. 34a).

It is obvious that the Sixth Circuit improperly substituted its views for those of the Trustees. The writ should be granted because the Sixth Circuit's decision is in direct conflict with *Bruch* and *Central Transport* which required the Sixth Circuit to defer to the Trustees' interpretation of the PA and Trust Agreement.

**II. THE WRIT SHOULD BE GRANTED BECAUSE THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE SEVENTH CIRCUIT'S DETERMINATION THAT THE SAME PA CONTINUES AFTER COLLECTIVE BARGAINING AGREEMENT TERMINATION.**

The Trustees' interpretation of their PA could not possibly be arbitrary or capricious since it is supported by numerous Seventh Circuit decisions. In *Central States Pension Fund v. Schilli Corp.*, 420 F.3d 663 (7th Cir. 2005), the Seventh Circuit held that the very same PA survived termination of a collective bargaining agreement as well as the collective bargaining relationship due to the decertification of the union until the required written notice of termination was served upon the Fund.

The Sixth Circuit held that the PA did not continue to obligate General to contribute after termination of a collective bargaining agreement unless there were ongoing contract negotiations between the union and employer. In *Schilli*, there were no collective bargaining negotiations after the union decertification because 29 U.S.C. §158(a)(1) and (2) prohibit an employer from negotiating with a union that does not represent a majority of its employees. *Int'l Ladies Garment Workers Union v. NLRB*, 366 U. S. 731, 736-37 (1961). Nevertheless, the Seventh Circuit held that the same PA obligated the employer to continue to contribute until the required termination notice had been served.

The Sixth Circuit decision is in direct conflict with the *Schilli* decision which was relied upon by the Trustees. It is imperative that this Court resolve this conflict because the rights of participants of Central

States (and of other multiemployer pension plans) turn on the forum of the lawsuit filed by Central States to collect contributions from the employer, or the forum of the lawsuit filed by the participant against the Fund that seeks additional benefits. The participants of the Fund expect, and are entitled to, certainty and uniformity in the determination of their pension benefits.

The minutes of the Board of Trustees meeting indicate that the Trustees also relied upon the unreported decision of the Seventh Circuit in *Central States Pension Fund v. Depew Development, Inc.*, 172 F.3d 52, 1998 WL 894642 (7th Cir. 1998) (Unpublished Disposition), where the Seventh Circuit held that the same PA obligated the employer to contribute after the collective bargaining agreement was terminated. In addition, the minutes indicate that the Trustees relied upon *Central States Pension Fund v. Dussault Moving Co.*, 871 F.Supp. 1046 (N.D. Ill. 1995) where the court held that the same PA obligated an employer to contribute even though the collective bargaining agreement had terminated and the bargaining relationship had ended due to the union's failure to seek a new contract.

Finally, the Trustees relied upon *Central States Pension Fund v. Marine Contracting Co.*, 878 F.Supp. 1176, 1178 (N.D. Ill. 1995), where the district court rejected the argument adopted by the Sixth Circuit that the same PA ended with the collective bargaining agreement because the PA incorporated terms from a terminated collective bargaining agreement:

The language [of the PA incorporating and defining terms with reference to the collective bargaining agreement] that Marine quotes does not

make its obligations under the Participation Agreement dependent on the existence of a collective bargaining agreement. The Participation Agreement simply refers to some of the terms of the collective bargaining agreement. It is well settled that parties to a contract may define contract terms by incorporating terms from another agreement. Nothing requires that the other agreement be enforceable, or still in effect. There is nothing else in the Participation Agreement that makes its requirements contingent on the continued existence of the collective bargaining agreement. It is an independent obligation.

This conclusion is bolstered by the duration clause of the Participation Agreement. Marine specifically agreed that it would be bound by the Agreement until it notified Central States that it was no longer under a legal duty to contribute. This clearly indicates that its obligation under the agreement existed separate and apart from the collective bargaining agreement.

Even though the minutes indicate that the Trustees relied on *Schilli* and these other decisions and these cases were cited in Central States' appellate brief, none of these decisions were mentioned by the Sixth Circuit. There is a direct conflict between *Schilli* and the Sixth Circuit decision, and the Writ should be granted to resolve this conflict.

### **III. THE SIXTH CIRCUIT'S DECISION IS INCONSISTENT WITH ERISA AND THE INTENT OF THE PARTIES.**

A court's interpretation of a contract should not denigrate or contradict basic principles of federal law and should be consistent with the purposes of the

parties. *International Union (UAW) v. Yard-Man, Inc.*, 716 F.2d 1476, 1479-80 (6th Cir. 1983). ERISA was enacted to protect the financial solvency of multiemployer funds and insure that employees receive promised benefits. 29 U.S.C. § 1001. The Sixth Circuit's decision frustrates both of these goals by increasing administrative costs and making benefit determinations less secure.

The Sixth Circuit determined that General's "duty to contribute to the Fund ended with the expiration of the collective bargaining agreement" on December 31, 1993. The courts of appeal, including the Sixth Circuit, have unanimously held that ERISA and the LMRA prohibit Central States from providing pension credit to employees based upon contributions that are not required by a written agreement. *Guthart v. White*, 263 F.3d 1099, 1102 (9th Cir. 2001); *Bagsby v. Central States Pension Fund*, 162 F.3d 424, 428-429 (6th Cir. 1998); *Curtis v. Noel*, 877 F.2d 159, 162-63 (1st Cir. 1989). *Moglia v. Geoghegan*, 403 F.2d 110, 116 (2nd Cir. 1968). As indicated above, the Sixth Circuit's decision has had a catastrophic impact on the General employee who retired in 1995. As a result of the elimination of his 30th year of credit, his monthly benefit has been reduced from \$2,000 to under \$500 and he owes a \$250,000 overpayment to Central States for the difference between the \$2,000 he received from 1995 to 2007 and the \$500 he is entitled to receive under the Sixth Circuit's decision. The other employee who had contributions paid on his behalf from 1994 until 2005 has not yet retired, but he will have his monthly benefit drastically reduced from \$1,681 to \$706 when he retires. It is unlikely Central States will ever be able to collect the \$250,000 overpayment and it will no doubt be forced to incur the additional cost of

further litigation with these two employees over these drastic benefit reductions.

The fact that there are now at least five cases where this issue has been fully litigated, coupled with the fact that Central States has thousands of employers with hundreds of thousands of participants, establishes that this issue will no doubt recur. While Central States can rely upon the bright line "written notice of termination" test established by the PA for employers outside the Sixth Circuit, it will be required to initiate investigations about the status of contract negotiations for employers within the Sixth Circuit. The investigations will be costly, because Central States will be required to check each month to verify that contract negotiations are ongoing. Moreover, Central States cannot rely on the mere representations of the parties; they may turn out to be wrong—as was Local 164's representations to Central States in 2000, 2002 and 2004 that General's collective bargaining agreement was still in effect. Further, Central States will inevitably be required to devote more of its scarce resources to uncertain and error-prone litigation over the status of contract negotiations. These costs will necessarily be passed on to other participating employers in the form of higher contributions and to participants of Central States in the form of lower benefits. Finally, an element of uncertainty will be introduced into the retirement plans of employees in the Sixth Circuit who may see their expected retirement benefit virtually obliterated (like the two General employees) by subsequent litigation between their employer and Central States or may be forced to delay their retirement while awaiting the result of litigation between their employer and Central States.

The courts in the Seventh Circuit have repeatedly determined that Central States' PA continues to obligate an employer to contribute after termination of the collective bargaining agreement even if the collective bargaining relationship has ended, until the employer satisfies the insignificant burden of providing a written notice to Central States that the duty to contribute has ended. This requirement protects the employer, the employees and Central States by establishing a bright line "written notice" test for termination (created by the PA and consistently upheld by the Seventh Circuit) thereby eliminating uncertainty about the employer's contribution liability and the employees' benefit entitlement. Central States and the two General employees who will otherwise have their benefits drastically reduced are entitled to enforcement of this notice provision. The Sixth Circuit opinion undermines the key ERISA goal of certainty and reliability in the determination of retirement benefits, and threatens many other participants with the same frustration of legitimate retirement expectations as the General employees experienced in this case.

**CONCLUSION**

The petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES P. CONDON  
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January 27, 2009

## **APPENDIX**

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APPENDIX A

UNITED STATES COURT OF APPEALS,  
SIXTH CIRCUIT.

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Nos. 07-1392, 07-1473.

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CENTRAL STATES, SOUTHEAST & SOUTHWEST AREAS  
PENSION FUND; HOWARD MCDUGALL,  
*Plaintiffs-Appellants / Cross-Appellees,*

v.

GENERAL MATERIALS, INCORPORATED, DBA  
WHOLESALE MATERIALS COMPANY,  
*Defendant-Appellee / Cross-Appellant.*

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Argued: April 23, 2008.

Decided and Filed: July 30, 2008.

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OPINION

Before: DAUGHTREY, COOK, and FARRIS, Circuit  
Judges.\*

COOK, Circuit Judge.

Plaintiff Central States Pension Fund (the "Fund") and a representative trustee appeal the district court's grant of summary judgment for defendant employer General Materials ("General") on the Fund's claim for overdue pension payments. We

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\* The Honorable Jerome Farris, Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

affirm, holding that General's duty to contribute to the Fund ended with the expiration of the collective bargaining agreement ("CBA") referenced in the correlating Participation Agreement.

## I. BACKGROUND

### A.

General is a small, family-owned lumberyard in Jackson, Michigan. The Fund is an ERISA "multiemployer plan," 29 U.S.C. § 1002(37), that collects pension contributions under labor agreements between employers and local unions. In 1969 General entered into the first of several CBAs with Local 164. These CBAs set pay scales and provided for union dues, welfare payments, and pension-fund payments. When signing each CBA, General and Local 164 also signed a Participation Agreement drafted by the Fund that remained substantively the same from contract to contract.

The Participation Agreement included provisions that incorporated and relied on the CBA's terms. For example, the Participation Agreement bound General to the Fund's Trust Agreement, which required each employer to "remit continuing and prompt contributions to the [Fund] as required by the applicable *collective bargaining agreement*." Under paragraph 5(a) of the Participation Agreement, General would contribute a set amount for a set period "for its bargaining unit Employees pursuant to the terms of the *collective bargaining agreement*." Paragraph 6 provided that payments would be made "only on behalf of employees in the *collective bargaining unit*." Under paragraph 13, the Participation Agreement defined an "Employer" and "Employee" in terms of their responsibilities under the CBA.

Pursuant to the Participation Agreement, General reported the work history of eligible employees and paid monthly contribution invoices that contained a clause (the "Certification Clause") stating that General "hereby reaffirms [its] obligation to make contributions *required by the Collective Bargaining Agreement* and further represents that all employees eligible to participate in the Fund . . . are being reported. . . ." The Participation Agreement also provided that it would "continue in full force and effect" absent written notice of termination.

From 1969 until 1991, these CBAs and Participation Agreements required General to make monthly pension contributions to the Fund on behalf of its union employees. General and Local 164 signed the CBA and Participation Agreement relevant to this case on December 17, 1991 (respectively, the "1991 CBA" and the "1991 Participation Agreement"). By its terms, the 1991 CBA expired on December 31, 1993, and would "continue in full force and effect from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served *by either party upon the other* at least sixty (60) days prior to the date of expiration." JA 509 (emphasis added). On October 21, 1993, General sent Local 164 a certified letter notifying the union that General intended to terminate the 1991 CBA. All parties concede that General did not notify the Fund itself of termination until this litigation began.

When the 1991 CBA expired on December 31, 1993, General had only two union employees, James Smith and Roy Swihart. Although General continued to contribute to the Fund for Swihart and Smith—under an alleged oral agreement with Local 164—it entered into no other CBAs or Participation Agreements but

instead instituted its own pension and profit-sharing plan, contributing to that plan for its non union employees.

### B.

After General rebuffed the Fund's attempted audit by providing only Swihart's records, the Fund filed a complaint for overdue contributions. General then sent a written request to the Fund's Trustees, asking for a refund of the contributions it paid on behalf of Swihart and Smith after the 1991 CBA expired. The Trustees denied the request and General filed a counterclaim for the refund.

Both sides filed motions for summary judgment, and the Fund then filed a Federal Rule of Civil Procedure 37(c)(1) motion to strike portions of General's response to the Fund's motion for summary judgment. After a hearing, without discussing the motion to strike, the district court held that the parties' conduct suggested "an understanding . . . that the 1991 CBA did *not* remain in full force and effect by way of the 1991 Participation Agreement," but terminated on December 31, 1993. The court then granted summary judgment to General on the Fund's claims for overdue pension payments. As for General's counterclaim, the court granted summary judgment for the Fund, holding that because "[General's union] employees realized a significant increase in the pension benefits paid to them," the Trustees did not act arbitrarily or capriciously in denying General a refund. Both parties appealed.

## II. ANALYSIS

We review *de novo* a district court's decision to grant summary judgment, affirming where the

evidence, viewed in the light most favorable to the non-movant, demonstrates that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The Fund argues that the court erred because: (1) the 1991 Participation Agreement obligated General to contribute; (2) the Certification Clause obligated General to contribute; and (3) the court failed to rule on the Fund's motion to strike. We hold that neither the 1991 Participation Agreement nor the Certification Clause obligated General to contribute after the 1991 CBA expired, and the court's failure to rule on the motion to strike is harmless error.

A.

The Fund contends that the 1991 Participation Agreement required General to contribute after the 1991 CBA expired. Citing a suit decided in its favor, *Central States Pension Fund v. Behnke, Inc.*, 883 F.2d 454 (6th Cir.1989), the Fund argues that federal courts can "enforce contractual obligations to contribute . . . established by independent, unexpired trust and participation agreements, which, by their terms, extend beyond the expiration of a CBA," *id.* at 464. *Behnke*, however, is inapposite.

First, in *Behnke*, the duty to contribute continued after a CBA expired because employer Behnke entered into a Participation Agreement and Trust Agreement during the *negotiation* period for a new CBA. The Participation Agreement in *Behnke*, effectively the same as the one involved here, incorporated language from the Trust Agreement providing that "[t]he obligation to make such contributions shall continue during periods when the collective bargaining agreement is being *negotiated*."

*Id.* at 461 (emphasis added). In other words, the Participation Agreement alone did not extend Behnke's duty to contribute—the Participation Agreement became significant only because it incorporated the Trust Agreement's provision for continuing contributions during negotiations for a new CBA. *See id.* ("The Trust Agreement incorporated into the Participation Agreement extends the obligation.") (emphasis added). General entered into no such negotiations after the 1991 CBA expired.

Second, unlike the Participation Agreement in *Behnke*, the 1991 Participation Agreement can be understood only by reference to the contemporaneously signed 1991 CBA. General and Local 164 signed the 1991 CBA and 1991 Participation Agreement on the same day, unlike the Participation Agreement in *Behnke*, which Behnke and the union signed after one CBA expired and before the next became effective.<sup>1</sup> The fact that General signed the two documents on the same day supports the view that the 1991 Participation Agreement cannot be understood apart from the 1991 CBA. In fact, the terms of the 1991 Participation Agreement depend wholly on the 1991 CBA. The 1991 Participation Agreement sets forth contribution rates dictated by the 1991 CBA, defines covered employees as those employed under the terms of the 1991 CBA, and

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<sup>1</sup> After a CBA expired on March 31, 1982, *Behnke* and the local union immediately began negotiations for a new CBA. *Behnke*, 883 F.2d at 456–57. Effective April 1, 1982, Behnke and the union entered into an Interim Agreement that expired on April 1, 1985. On June 9, 1983, Behnke and the union signed the Participation Agreement incorporating the Fund's Trust Agreement, which extended the duty to contribute until Behnke and the union signed a new CBA in November 1985. *Id.* at 457, 461–62.

defines an employer as one bound by the 1991 CBA. After the 1991 CBA expired, the orphan 1991 Participation Agreement became incognizable. Cf. *Laborers Health & Welfare Trust Fund v. Leslie G. Delbon, Inc.*, 199 F.3d 1109, 1111 (9th Cir.2000) (“[A] contract to contribute to a trust fund of a Union with which [the employer] has no ongoing collective bargaining agreement makes no sense.”) (citation and internal quotation marks omitted). As a result, the 1991 Participation Agreement did not obligate General to contribute after the 1991 CBA expired.

B.

We likewise find lacking the Fund’s contention that the Certification Clause included in its monthly bills extended General’s duty to contribute. For support, the Fund points to a Seventh Circuit decision and an unpublished decision from the Northern District of Illinois. In *Bricklayers Local 21 v. Banner Restoration, Inc.*, 385 F.3d 761 (7th Cir.2004), the Seventh Circuit stated: “[W]e consider the certification language on the monthly reports and the accompanying payments as entitled to *some weight* in an analysis of whether Banner’s conduct manifested intent to abide by the collective bargaining agreement.” *Id.* at 767 n. 3 (emphasis added). In *Banner*, however, the court considered certification language only because the employer did not sign a CBA but conducted itself as though a CBA existed. In any event, the *Banner* court observed that the Seventh Circuit is undecided as to whether certification clauses are “entitled to some weight . . . and maybe a lot,” *id.* (quoting *Operating Eng’s Local 139 Health Benefit Fund v. Gustafson Constr. Corp.*, 258 F.3d 645, 650 (7th Cir.2001)), or are only “weak evidence,”

*id.* (quoting *Dugan v. R.J. Corman R.R. Co.*, 344 F.3d 662, 668 (7th Cir.2003)).

The Fund also cites *Central States Pension Fund v. Kabbes*, No. 02 C 1809, 2004 WL 2644515 (N.D. Ill. Nov. 18, 2004), where the Northern District of Illinois reasoned that “[e]ven when the Defendants did not sign the reporting forms, they manifested their intent to be bound by the Certification Clause by completing the reporting forms and submitting their checks. . . .” *Id.* at \*17. Although *Kabbes* allows certification clauses to bind an employer, the *Kabbes* court relied in part on the *Behnke* decision and, in doing so, read *Behnke* too broadly. *See id.* at \*14 (citing *Behnke* despite *Behnke*’s silence on whether certification clauses could extend an employer’s duty to contribute). No Sixth Circuit case law supports the Fund’s contention. Given the paucity of pertinent Sixth Circuit precedent—as well as the equivocal weight the Seventh Circuit gives certification clauses—we conclude that the Certification Clause did not obligate General to contribute after the 1991 CBA expired.

### C.

Finally, the Fund contends that the district court erred by not ruling on its motion to strike. Generally, district courts should resolve discovery motions before granting summary judgment. *Lexicon, Inc. v. Safeco Ins. Co. of Am.*, 436 F.3d 662, 673 (6th Cir. 2006). But if a court can rule on a summary judgment motion without resorting to information contained in a discovery motion, the failure to rule is harmless error. *Id.* The Fund’s motion to strike argued that, in its response brief to the Fund’s summary judgment motion, General offered affirmative defenses based on new evidence. The evidence at issue included

General's reports on employee changes, the significant drop in contributions after the 1991 CBA expired, the lack of an increase in General's pension contribution rate over a thirteen-year period, and the Fund's contact with General concerning untimely payments. Reviewing the record as a whole, we conclude that even were the district court to strike the disputed portions, the court would reach the same resolution of the summary judgment motion. The failure to rule on the Motion to Strike is therefore harmless error.

### III. CONCLUSION

Because the district court properly granted summary judgment for General as to the Fund's claim for overdue pension contributions, we affirm.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

[Filed Oct. 29, 2008]

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No. 07-1392/1473

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CENTRAL STATES, SOUTHEAST &  
SOUTHWEST AREAS PENSION FUND, *et al.*,  
*Plaintiffs-Appellants / Cross-Appellees*,

v.

GENERAL MATERIALS, INCORPORATED, DOING  
BUSINESS AS WHOLESALE MATERIALS COMPANY,  
*Defendant-Appellee / Cross-Appellant*.

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BEFORE: DAUGHTREY, COOK, and FARRIS\* *Circuit Judges*.

The court having received a petition for rehearing *en banc*, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing *en banc*, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

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\* Hon. Jerome Farris, Senior United States Circuit Judge for the Ninth Circuit Court of Appeals, sitting by designation.

11a

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green  
Leonard Green  
Clerk

12a

**APPENDIX C**

UNITED STATES DISTRICT COURT,  
E.D. MICHIGAN, SOUTHERN DIVISION.

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No. 04-73593.

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CENTRAL STATES, SOUTHEAST AND  
SOUTHWEST AREAS PENSION FUND, and  
HOWARD MCDUGALL, trustee,  
*Plaintiffs,*

v.

GENERAL MATERIALS, INC.,  
D/B/A WHOLESALE MATERIALS CO.,  
*Defendant.*

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Feb. 12, 2007.

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OPINION AND ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S APRIL 7, 2006  
RENEWED MOTION FOR PARTIAL SUMMARY  
JUDGMENT AND GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS' APRIL 7, 2006  
RENEWED MOTION FOR SUMMARY JUDGMENT

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JOHN CORBETT O'MEARA, United States *Dis-*  
*trict Judge.*

This matter came before the court on defendant General Materials' April 7, 2006 renewed motion for partial summary judgment and plaintiff Central States' April 7, 2006 renewed motion for summary judgment. The parties filed responses and replies, and oral argument was heard August 10, 2006.

## BACKGROUND FACTS

This is an ERISA action brought by plaintiff Central States Pension Fund ("Fund") to collect pension benefits totaling \$656,769 plus interest, which the Fund claims is owed by defendant General Materials, a family-owned lumberyard in Jackson,

Michigan. General maintains that nothing is owed because the last collective bargaining agreement ("CBA") with Local Union 164 of the International Brotherhood of Teamsters expired December 31, 1993. General's counterclaim is for the \$44,000 it has paid in pension contributions to Plaintiffs since 1999 for two employees who were originally covered under previous CBA's with the Union. One of those employees has since retired. Only a small portion of the Fund's claim, less than \$50,000, relates to the period before the December 1993 termination of the CBA.

Beginning in the late 1960's, General was required to make contributions on behalf of certain employees performing covered work pursuant to its labor agreements with Local 164. The most recent CBA between General and Local 164 was effective January 1, 1991. The 1991 CBA provided, "The terms of this Agreement shall apply to all employees in the classifications of work set forth herein and shall cover all accretions to a route or relocations of bargaining unit operations, including newly established required warehousing, transportation or processing operations of the employer." Ex. 6 to Plaintiffs' Ex. A.

The duration clause of the 1991 CBA provided that the "Agreement will remain in full force and effect from January 1, 1991, to and including December 31, 1993 and shall continue in full force and effect from year to year thereafter *unless written notice of desire*

*to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration."* *Id.* (emphasis added). General claims that a notice to terminate was served more than 60 days before December 31, 1993, on Local 164; however, neither General nor Local 164 notified the Fund of the termination of the 1991 CBA before Plaintiffs began its audit in 2004.

At the time the 1991 CBA was signed, General also signed a form Participation Agreement ("PA") that was drafted by Central States. The PA's duration clause provided,

This agreement shall continue in full force and effect until such time as the Employer notifies the Fund(s) by certified mail (with a copy to the Local Union) that the Employer is no longer under a legal duty to make contributions to the Fund(s). The Employer shall set forth in the required written notice to the Fund(s) the specific basis upon which the Employer is relying in terminating its obligation to make contributions to the Fund(s). The Employer expressly agrees and hereby acknowledges by the signing of this Agreement that its obligation to make contributions to the Fund(s) shall continue until the above-mentioned written notice is received by the Fund(s) and the Trustees acknowledge the Employer's termination in writing.

¶5c of Ex. 7 to Plaintiffs' Ex. A. No *written* notice of termination was provided to Central States until General's November 2, 2005 letter requesting a refund of the contributions paid after 1995.

The 1991 PA also contained a dispute resolution clause that provided that all disputes arising between

the Employer and the Fund(s) would be submitted for resolution to the Trustees of the Fund(s). *Id.* at 14. Furthermore, according to the Pension Fund Trust Agreement incorporated into the 1991 CBA and the 1991 PA, "The Trustees are vested with discretionary and final authority in making all such decisions . . . ." Specifically included in those are decisions regarding whether an employer is entitled to a contribution refund.

In this case, General remitted contributions to Central States after the December 31, 1993 termination of the 1991 CBA on behalf of James Smith until he retired in January 1995 and on behalf of Roy Swihart through October 1, 2005. These contributions were paid in accordance with monthly bills which contained a certification clause that read:

The employer hereby reaffirms his obligation to make contributions required by the collective bargaining agreement and further represents that all employees eligible to participate in the Fund, in accordance with the rules of the Fund and the 'Employee Retirement Income Security Act of 1974', are being reported and only those eligible employees are being reported.

Plaintiffs' Ex. A, 27.

The 1991 CBA and the 1991 PA increased the contribution rate and moved General employees from Benefit Class 15 to Benefit Class 16. As a result of the class improvement and the additional year of credit earned for 1994, employee Smith crossed a pension credit threshold of 30 years, thereby increasing his monthly benefit entitlement from \$444.50 per month to the \$2,000 per month he has received since he retired in January 1995. Employee

Swihart has not yet retired. His monthly benefit entitlement also increased significantly, from \$705.87 at age 65 to \$1,621.32 at age 62, as a result of the credit earned from 1994 to 2005. Plaintiffs' Ex. A at 46. In addition, three other employees who retired in 1992 and 1993 received significant increases as a result of Central States' acceptance of the 1991 CBA and 1991 PA, totaling the following amounts: employee Bonney, \$108,927; employee Sheehan, \$171,000; and employee Eastman, \$120,700.

In 2004, Central States decided to audit defendant General's payroll records to verify that all required contributions had been paid. General refused to provide access to payroll records other than Swihart's because it claimed that it had orally agreed with Local 164 that General would be required to remit contributions on behalf of only Smith and Swihart and that any new hires would not be subject to the CBA.

During the course of this lawsuit, an audit was performed. Plaintiffs claim that the audit revealed that there were employees performing work covered by the labor contracts before the December 31, 1993 termination of the 1991 CBA that were not reported to Central States; therefore, \$48,254 in contributions, excluding interest, are owed to Central States. In addition, Plaintiffs claim that the audit revealed 40 additional employees who worked for General after December 1993 who had no contributions paid on their behalf; therefore, an additional \$628,515, excluding interest is allegedly owed.

In a November 2, 2005 letter, General asserted that the contributions it had paid after 1993 were paid by mistake, since Plaintiffs contend that there was no enforceable oral agreement, and requested the return of the \$44,000 in contributions paid after

November 1995 (the "refund request"). General also advised Central States in writing for the first time that as of November 1, 2005, it was ceasing to remit any further contributions to Central States.

On December 15, 2005, the Board of Trustees denied the refund request. The Trustees concluded that General was contractually obligated to contribute to Central States after 1994 because: 1) the 1991 PA remained in effect as a result of General's failure to provide the required notice of termination; and 2) General reaffirmed its obligation to contribute under the 1991 CBA by making monthly payments in accordance with the bills which contained the certification clause. The Trustees further concluded that there could be no refund because Central States had paid employee Smith over \$200,000 in pension benefits to which he would not be entitled if General's duty to contribute had ended in 1993 and Swihart's benefit expectation would be drastically reduced.

Plaintiffs filed this lawsuit in the United States District Court for the Northern District of Illinois on March 29, 2004. The case was transferred to this court September 15, 2004. The First Amended Complaint was filed October 24, 2005; and Defendant filed a counterclaim November 9, 2005. The Second Amended Complaint was filed December 29, 2005; and the First Amended Counterclaim was filed January 25, 2006. This memorandum opinion and order addresses the parties' April 7, 2006 renewed motions for summary judgment.

#### LAW AND ANALYSIS

The parties agree that the arbitrary and capricious standard applies to the Trustees' decision that General owed contributions from 1993 as well as the Trustees' denial of General's request for a refund.

Plaintiffs' br. at 8; Defendant's br. at 22 of counter-claim; see *Bagsby v. Central States Pension Fund*, 162 F.3d 424, 428 (6th Cir.1998).

Although defendant General claims that it sent written notification to Local 164 in a timely fashion to terminate the 1991 CBA at the end of the term (December 31, 1993), there is no dispute that General failed to send written notification to Plaintiffs. Defendant's argument that Local 164 serves as an agent for the Funds was rejected by the United States Court of Appeals for the Sixth Circuit in *Central States Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 460 (6th Cir.1989).

In addition, General argues that an oral agreement existed between General and the local to terminate the CBA and that General agreed to continue contributions for two employees, Smith and Swihart, until their retirements. Fred Schmid, the owner of General, is no longer competent to answer questions regarding that agreement; therefore, Plaintiffs argue that Defendant has no evidence of this oral contract. However, there is indeed evidence of such an agreement if one looks to the way the employer, the local, and the pension funds have all conducted themselves during the relevant time period. All of their conduct shows that no one believed a CBA was in effect after the termination of the 1991 CBA on December 31, 1993; and the parties all acted accordingly.

For example, defendant General hired over 40 employees during the time period Central States contends would have been covered by a hypothetical CBA. For each of those employees, General never withheld union initiation fees or dues, never paid those employees according to the union scale of the 1991-93 agreement, never recognized or dealt with a

union steward, never maintained or posted a seniority list, never notified the union of discipline, never was involved in a grievance in regard to those employees, never observed the just cause termination requirement of the 1991-93 agreement, never made contributions to the Welfare Fund, and never made contributions to Central States. For the sole remaining employee who was a union member under the 1991-93 CBA, General has deducted union dues, paid pension contributions, and paid welfare fund contributions.

Over the years, General has adopted and contributed to its own pension plan and profit sharing plans, making \$494,703.12 in contributions for those 40 employees for which Central States is seeking contributions. In addition, in late March or early April in 1997, Fred Fadely, a General employee, attempted to get fellow employees to join the union. Local 164 secretary/treasurer Dennis Hands met with four employees who signed authorization cards. Ultimately, however, the majority of General workers were not interested in the union; and no contract was ever signed and no deductions were taken for those four employees.

On January 29, 2001, General was contacted by Richard Amos on behalf of Local 164 regarding the Welfare Fund's need to have a signed PA. General refused to sign but indicated that it would continue to make contributions for Swihart. On October 31, 2002, General received a request for an audit from the Welfare Fund; and General provided only materials for Swihart. On December 23, 2002, General received a letter indicating "the auditor's review revealed no discrepancies in your reporting to the fund." Defendant's Ex. S. On January 23, 2004, Central States re-

requested an audit of General; and General again provided materials only for Swihart. Central States then filed this lawsuit.

Both parties rely on *Central States Pension Fund v. Behnke, Inc.*, 883 F.2d 454 (6th Cir.1989). Defendant Behnke was obligated to contribute funds to the same group of plaintiffs as this case, Central States. The amount in dispute was less than \$140,000, which Central States claimed was delinquent for only a one and one-half year period. In this case, Central States claims that over \$650,000, excluding interest, is delinquent for a period of time dating back to and including the mid-1970's. Judge Wellford, in his dissenting opinion in Behnke, found the award was "both unjust and unreasonable" in light of Behnke's "apparent good faith reliance upon an oral CBA found to be unenforceable."

In this case, defendant General continued to make contributions in good faith for the two employees who were covered under the 1991 CBA until they retired. In other words, General's conduct, as well as the conduct of Central States in accepting those contributions and questioning no others until an audit was performed after this lawsuit was filed, argues in favor of an understanding between the parties that the 1991 CBA did not remain in full force and effect by way of the 1991 PA.

Moreover, in Behnke, the parties were in between collective bargaining agreements at all relevant times. In this case, the parties never entered into another CBA after the 1991 agreement, which expired by its terms on the last day of 1993.

The Sixth Circuit has also held that the "discovery rule" for accrual of limitations periods applies to ERISA actions to collect delinquent contributions to em-

ployee benefit funds. *Michigan United Food and Commercial Workers Unions v. Muir Co., Inc.*, 992 F.2d 594 (6th Cir.1993). In *Muir*, the court considered whether the action was barred by Michigan's six-year statute of limitations period for contracts. In that case the plaintiffs sued for underpaid contributions in the amount of about \$20,000. The court affirmed the district court's decision that the funds' claims had accrued more than six years before the funds filed suit. In applying the discovery rule, the central question became whether the fund should have become aware of the defendant employer's underpayments.

The fund argued that it had no particular and specific reason to doubt the accuracy of the employer's reports until it completed its audit and that the six year statute of limitations should have begun to run from that point in time. The court found, "[I]t is apparent that the crucial question in this case is whether the Funds had sufficient notice of probable discrepancies in the employer's contribution reports that the concept of due diligence required them to investigate long before they did." *Id.* at 599. "The facts in this case show that the Funds, by conducting an internal audit using information already within their possession, had the ability to discover probable discrepancies and underpayments at any time after the employer's monthly reports were received." *Id.* at 599-600.

In defining the concept of "due diligence," the court found it "notable that the Welfare Fund in this case was hardly in the position of a 'typical lay person.' Instead, the Funds' auditors were experts in the accounting methods required to detect the kinds of employer reporting errors involved in this case . . . ." *Id.* at 600." Compared to the typical lay person, the Wel-

fare Fund had superior personnel and equipment with which to detect foreseeable employer error." *Id.*

Just as in *Muir*, Plaintiffs in this case received monthly contributions from General. With due diligence, Plaintiffs should have noticed that there was a 90% reduction in individuals for whom contributions were being made; that no signed billing statements affirming General's obligations under any CBA were received after February 2, 1995; that no new employees were reported after November 1993; that no new contract was signed even though a new one had been signed at the expiration of each former contract; that the contribution amount itself never increased after 1993; and that ultimately the number of covered employees had dwindled to only one.

This lawsuit was filed in the United States District Court for the Northern District of Illinois on March 29, 2004. Plaintiffs argue that the court should apply Illinois' 10-year statute of limitations to this action; however, the Sixth Circuit has held that the statute of limitations of the state in which the action is located governs. *Central States Pension Fund v. Kraftco, Inc.*, 799 F.2d 1098 (6th Cir.1986). Michigan law provides a six-year statute of limitations period to contract actions.

Applying the six-year statute of limitations to this case, all of Plaintiffs' claims are time barred. With due diligence, Plaintiffs should have become aware of any discrepancies long before March 29, 1998. General had stopped making contributions for employees other than Swihart and Smith as of January 1, 1994. Therefore, the decision of the Board of Trustees that General was contractually obligated to contribute to Central States after 1994 is arbitrary and capricious. The court will deny Plaintiffs' motion for summary

judgment on all claims except Defendant's counterclaim.

Defendant General's counterclaim seeks a refund of the \$44,000 it paid Plaintiffs for Swihart and Smith during the relevant time period. However, Defendant cannot have it both ways. As Defendant continued to pay into the Fund for the benefit of these two employees, the employees realized a significant increase in the pension benefits paid to them and to be paid to them by the Fund. Therefore, the decision of the Board of Trustees that General was not entitled to a refund was not arbitrary and capricious. Plaintiffs are entitled to summary judgment on Defendant's counterclaim.

Defendant's renewed motion for partial summary judgment seeks summary judgment on Count II of Plaintiffs' Second Amended Complaint, which makes a claim for the allegedly delinquent contributions. Essentially, Defendant's motion is a cross motion for summary judgment because the only other count in Plaintiffs' Second Amended Complaint is for the audit which has now been performed. For the reasons set forth above, Defendant is entitled to summary judgment on all claims except its counterclaim.

#### ORDER

It is hereby ORDERED that Plaintiffs' April 7, 2006 renewed motion for summary judgment is GRANTED IN PART AND DENIED IN PART.

It is further ORDERED that Defendant's April 7, 2006 renewed motion for partial summary judgment is GRANTED IN PART AND DENIED IN PART.

**APPENDIX D**

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

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Case No. 04-73593

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CENTRAL STATES, SOUTHEAST AND  
SOUTHWEST AREAS PENSION FUND, and  
HOWARD MCDUGALL, trustee,  
*Plaintiffs,*

v.

GENERAL MATERIALS, INC.,  
D/B/A WHOLESALE MATERIALS CO.,  
*Defendant.*

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**JUDGMENT**

Honorable John Corbett O'MEARA

This matter came before the court on the parties' motions for summary judgment. The court entered an order February 12, 2007, granting in part and denying in part Defendant's Renewed Motion for Partial Summary Judgment and granting in part and denying in part Plaintiffs' Renewed Motion for Summary Judgment.

It is hereby ORDERED AND ADJUDGED that in regard to Plaintiffs' claims in their Second Amended Complaint for an audit and for delinquent contributions, judgment is entered against Plaintiffs and in favor of Defendant, with the parties to bear their own costs and attorney fees.

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It is further ORDERED AND ADJUDGED that in regard to Defendant's Amended Counter-Complaint for return of excess contributions, judgment is hereby entered against Defendant and in favor of Plaintiffs, with the parties to bear their own costs and attorney fees.

DAVID J. WEAVER  
CLERK OF THE COURT

Date: March 14, 2007

By: /s/ William Barkholz  
William Barkholz  
Deputy Clerk

**APPENDIX E****MINUTES OF THE PENSION BOARD MEETING  
DECEMBER 14, 2005**

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Item No. 15  
General Materials, Inc.  
Account No.: 3072650-0103  
Local Union No. 164

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The Fund's suit against General Materials, Inc. ("General") to collect over \$600,000 in contributions that were revealed to be owed by an audit covering 1990 through October 2005 is currently pending. On November 2, 2005, General made a written request for the refund of all of the \$44,370 in contributions it paid to the Fund from November 1995 through October 2005 (pp. 1-2) and it has supplemented its request with a position statement (pp. 3-141). General contends that there was no written contract requiring it to remit any contributions after December 1993. While General concedes that it continued to contribute from January 1994 until October 2005, it maintains that it did so under an alleged oral agreement with Local 164 which limited General's liability to two specifically named employees until they retired and excluded from coverage any other employees that performed the work that had historically been covered by the collective bargaining agreement. General claims that it now recognizes that the alleged oral agreement is unenforceable and it claims that the \$44,370 in contributions it paid since November 1995 should be returned because the payments were made under the mistaken belief the oral agreement was valid.

## THE WRITTEN AGREEMENTS

General has participated in the Pension Fund since 1966. The last collective bargaining agreement signed by General indicated that it would remain in effect from January 1, 1991 through December 31, 1993 "and from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration." (p. 38). At the same time it signed the collective bargaining agreement, General signed a participation agreement (pp. 48-49). The 1991 collective bargaining agreement and the participation agreement increased contributions from the Benefit Class 15 rates to the Benefit Class 16 rates (pp. 33, 48).

General contends that it provided Local 164 with a timely notice that terminated the 1991 collective bargaining agreement on December 31, 1993 (pp. 13, 65). The duration clause of the 1991 participation agreement indicated that General would be obligated to continue to contribute to the Pension Fund until General "notifies the Fund by certified mail (with a copy to the Local Union) that the Employer is no longer under a legal duty to make contributions to the Fund." (p. 48, ¶ 7). General did not notify the Fund of the termination of the collective bargaining agreement until the Fund performed its audit in 2004 (p. 148, ¶ 23). The notice of termination required by the participation agreement was not provided to the Fund at any time prior to General's letters requesting the refund (p. 145, ¶ 15). During the period from January 1994 through October 2005, General continued to contribute to the Fund in accordance with bills and one reporting form that contained a "certification clause" that required General to "reaffirm his obliga-

tion to make contributions required by the collective bargaining agreement." (p. 146, ¶ 16). These bills were not signed by General. During this nearly eleven year period, General submitted only one signed reporting form to Fund (pp. 71-72).

The participation agreement as well as the Pension Fund trust agreement obligate employers to provide the Pension Fund with notice of any changes in their labor contract. (p. 48, ¶ 5(c); Art. III, Sec. 1 of trust agreement) The Pension Fund trust agreement (Art. III, Sec. 1) indicates that any contract modification that is not disclosed in writing to the Fund "shall not be binding on the Trustees and shall not affect the terms of the collective bargaining agreement which alone shall be enforceable." No notice of the alleged oral agreement was provided before the Fund initiated the audit in 2004 (p. 149, ¶ 8).

General recognizes that the trust agreement limits contribution refunds to amounts paid within 10 years of the refund request and requires that overpayments be used to offset other liabilities of an employer before a cash refund can be given. Therefore, it only requests the return contributions paid within 10 years of its November 2, 2005 refund request, and only after any withdrawal liability calculated based upon a December 31, 1993 withdrawal date has been satisfied (p. 6).

#### THE ALLEGED ORAL ARGUMENT

General contends in its refund request that at some unspecified date after it sent the 1993 notice to terminate the collective bargaining agreement, Frederick Schmid of General orally agreed with Dennis Hands of Local 164 that effective January 1, 1994, General's obligations would be limited to two specifi-

cally named employee (James Smith and Roy Swihart) and any other employee would not be covered by the labor contract (pp. 12-13).

### IMPACT OF REQUESTED REFUND IN REPORTED EMPLOYEES

General contributed on Smith until he retired on January 1, 1995 and on Swihart through October, 2005, but not its other employees who were performing the type of work that is covered by the 1991 collective bargaining agreement (pp. 5, 6, 9). If General is correct that it had no obligation to contribute after December 31, 1993, the benefit entitlement of Smith and Swihart will be affected. Smith retired at age 51 effective January 1, 1995 and has been receiving a monthly pension benefit of \$2,000 (p. 146, ¶ 15; p. 153). If the contributions paid on his behalf in 1994 were not due, Smith had only 29 years of Contributory Credit. This would mean he was ineligible to receive a 30 year benefit and would reduce his monthly pension to a Contribution Based Benefit of \$444.50 (p. 146, ¶ 15). Further, he will owe an overpayment of over \$200,000 to the Pension Fund.  $((\$2,000 - \$444.50) \times 131 \text{ months} = \$203,770.50)$  (p. 146, ¶ 15). Under the Plan, the overpayment will be recouped by freezing Smith's future benefit payments for three months and thereafter, by reducing his monthly benefit of \$444.50 by 25% to \$333.38. Swihart is 52 years old and has not yet retired. If the Contributory Credit Swihart earned after December 1993 is eliminated, his age 62 Contribution Based Benefit is reduced from over \$1,600 to approximately \$700 (p. 146, ¶ 15).

**ANALYSIS:** General contends that it is entitled to the contribution refund for the following reason:

Based on Mr. Hands' testimony, General Materials has determined that any and all pension

payments made by it to Central States, on or after December 31, 1993, were based upon a mistake of fact and/or law. As there was no collective bargaining agreement in place and both Central States and the Union Local deny the existence of the oral agreement, General Materials was prohibited by law from contributing to Central States during this period.

(p. 2). Thus, General's assertion that a mistake occurred is dependent upon whether there was an oral agreement and whether the written agreements that required it to remit contributions were terminated. Further, there may be equitable considerations that preclude a refund.

#### A. The Existence of the Oral Agreement

General's refund claim turns upon the existence of the oral agreement. If there was no oral agreement, then there was no mistake that would entitle General to a refund. The only direct evidence of the oral agreement is in an affidavit signed by Schmid on April 29, 2004 which indicates:

[I] entered into an agreement with Local 164 that General Materials would continue to treat one employee, Roy Swihart, as a Union Employee and would pay union dues, pension fund contributions, and contributions to the health and welfare fund for that employee [and]. . . thereafter General Materials treated all employees other than Roy Swihart that would have been members of the bargaining unit under the cancelled collective bargaining agreement as non-union employees and paid their wages and benefits as non-union employees.

(p. 130, ¶ 6). By the time of his deposition on September 7, 2005, Schmid testified that he could no longer remember the oral agreement because "on top of my age, I also had a stroke a few years ago." (p. 133). Since the affidavit was signed 16 months earlier, Schmid had suffered the stroke before he signed the affidavit and he was only 16 months older at the time of the deposition than the day he signed the affidavit.

General also cites circumstantial and hearsay evidence in support of its allegation that there was an oral agreement. First, General asserts that the existence of the oral agreement is supported by the evidence indicating that General did not comply with the provisions of the collective bargaining agreement with respect to its other employees after 1993, without any objection from Local 164 (p. 13). However, the audit and the testimony of General's office manager indicated that General's practice of not reporting its new hires began many years before 1994 (p. 150, ¶ 28, p. 157), apparently without any objection from Local 164. In its position statement, General denies the auditors determination that contributions were owed for the period before 1994 (p. 5), but it cites no supporting evidence. Thus, it is equally likely that the non-payment after 1993 was merely the continuation of General's unilateral practice that began well before 1993 and not based upon an alleged oral agreement.

General also points to the testimony of Dennis Hands that he took no action in 1997 after sending a letter to General demanding that five employees "immediately be paid the correct hourly rate and also have all benefits that the Collective Bargaining Agreement calls for." (p. 118). However, General also

claims that the reason the Hands took no action in 1997 was his belief that a majority of the employees no longer wanted to be represented by Local 164 (p. 11), not because there was an oral agreement that eliminated the employees from coverage. Indeed, the fact that Hands sent the letter demanding that the employees receive the contract wage rate and benefits undermines the assertion that he had previously orally agreed to limit the scope of the bargaining unit to two employees.

General also relies upon the depositions of two of its management employees who testified that Schmid told them there was an oral agreement (p. 12). This evidence is hearsay that would not be admitted in a judicial proceeding. However, it can be considered by the Trustees in connection with General's refund request and given whatever weight the Trustees deem appropriate.

There is also other evidence undermining the oral agreement claim. At his deposition, Dennis Hands denied the allegation that he made any oral agreement with General (pp. 62-63). Further, Schmid's affidavit asserts that the oral agreement limited General's liability to "one employee, Roy Swihart," but General now contends the oral agreement also covered a second employee (James Smith). Schmid's affidavit is also lacking important details with respect to the oral agreement such as an estimated date of when the agreement was made and any explanation of why Hands would agree to an arrangement that would inevitably lead to the end of Local 164's role as employee representative. Schmid's current inability to remember the oral agreement as well as the error in the affidavit and its lack of detail, undermine the credibility of the affidavit.

Even if the oral agreement existed, it is not binding on the Pension Fund because it was not disclosed to the Fund as required by Paragraph 5(c) of the participation agreement (p. 4B) and Article III, Section 1 of the Trust Agreement.

#### B. The Contractual Liability Issue

Based upon the written notice of termination sent to Local 164 by General in October 1993, it appears that the 1991-1993 CBA terminated on December 31, 1993. However, the Participation Agreement that was signed contemporaneously with the 1991-1993 collective bargaining agreement has its own duration clause:

This Agreement shall continue in full force and effect until such time as the Employer notifies the Fund(s) by certified mail (with a copy to the Local Union) that the Employer is no longer under a legal duty to make contributions to the Fund(s). The Employer shall set forth in the required written notice to the Fund(s) the specific basis upon which the Employer is relying in terminating its obligation to make contributions to the Fund(s). The Employer expressly agrees and hereby acknowledges by the signing of this Agreement that its obligation to make contributions to the Fund(s) shall continue until the above-mentioned written notice is received by the Fund(s) and the Trustees acknowledge the Employer's termination in writing.

(p. 48, ¶ 7). The Fund did not receive the required written notice at any time before General submitted its refund request (p. 145, ¶ 15). General does not contend that it provided the required written notice to the Fund so the Participation agreement was not

terminated. General simply speculates that it "believed and understood" that Local 164 told the Fund (pp. 159-60, ¶ 6). However, the participation agreement requires written notice from General. Further, Local 164 denied that the oral agreement existed and it obviously would not provide notice of a non-existent agreement to the Fund. Thus, the participation agreement remained in effect and imposed an ongoing contractual obligation to remit contributions to the Fund upon General.

General also contends that the participation agreement did not survive the termination of the 1991 collective bargaining agreement because language in the participation agreement makes its existence dependent upon the existence of a non-terminated collective bargaining agreement (p. 17). The Trustees have never believed that the participation agreement ends with the termination of a collective bargaining agreement. To the contrary, the Fund has repeatedly (and successfully) argued that the participation agreement contractually obligates an employer to continue to contribute after the termination of the collective bargaining agreement. *Central States Pension Fund v. Depew Development, Inc.* 172 F.3d 52 (7th Cir. 1998) (Unpublished Disposition); *Central States Pension Fund v. Behnke, Inc.*, 883 F.2d 454 (6th Cir. 1989); *Central, States Pension Fund v. Marine Contracting Co.*, 878 F.Supp. 1176 (N.D. 111. 1995); *Central States Pension Fund v. Dussault Moving Co.*, 871 F.Supp. 1046 (N.D. Ill. 1995); *Central States Pension Fund v. R, D. Motor Express*, 1988 WI, 93936 (N.D. Ill. 1998). In all of these cases, the employer had signed the same participation agreement signed by General. Under paragraph 14 of the participation agreement, this interpretation is binding on General (p. 49, 1 14).

General also argues that the *Behnke* decision is distinguishable because the employer in that case signed an interim agreement at the time it signed the participation agreement and that it was only because there was both a participation agreement and an unexpired interim agreement, that "the Court held that *Behnke* was required to contribute up until the date the New contract was signed" in November 1985 (p. 17). In reality, *Behnke* is indistinguishable because the court held that the interim agreement only "remained in effect until its stated expiration date(4/1/85)" (not 1985 as General claims). 883 F.2d at 461. Despite the April 1985 termination of the collective bargaining agreement (which was labeled as an "interim" agreement), the court held that Behnke still remained obligated to contribute from April, 1985 until November, 1985 based upon the "independent, unexpired trust and participation agreements." 883 F.2d at 464. Thus, contrary to General's claim, the collective bargaining agreement in *Behnke* was terminated for a portion of the period the Fund sought contributions. Therefore, there is no merit to General's assertion that the *Behnke* decision is distinguishable.

After the termination of a collective bargaining agreement, an employer remains obligated by federal law (29 U.S.C. § 158) to continue to contribute to the Fund while negotiations for a successor agreement are ongoing. However, this statutory duty is only enforceable before the NLRB which is an unacceptable forum for resolving contribution claims for numerous reasons including: a) the NLRB has discretion to refuse to pursue a claim, and the NLRB (not the Fund) controls litigation strategy and settlement decisions, b) the NLRB would likely allow the union and employer to enter into an agreement that retroactively

changes, or even eliminates, the employer's contribution obligation even if the Fund had already provided benefits, c) the statute of limitations for filing an NLRB charge is very short (only six months) while NLRB proceedings are often very slow, and d) the remedies available to the Fund under ERISA and the trust agreement are not all available in an NLRB proceeding. The duration clause of the participation agreement was created by the Fund to eliminate these problems by imposing a contractual duty enforceable under ERISA that obligates employers to continue to contribute until they provide the Fund with written notice that their "legal duty to make contributions to the Fund" (*i.e.* both the contractual duty imposed by the collective bargaining and trust agreements and the statutory duty imposed by the NLRA) has ended. While the participation agreement incorporates language of the collective bargaining agreement, the continuation of the participation is not dependent upon the existence of a non-terminated collective bargaining agreement; the participation agreement indicates otherwise by stating that the duty to contribute can only end upon written notice to the Fund that the employer's legal obligation to contribute has ended. Acceptance of General's interpretation would make the duration clause of the participation agreement meaningless since it would merely duplicate the duration clause of the collective bargaining agreement.

General also argues that the Fund has demanded contributions on employees in a job classification that did not exist before 1994 that it calls "load builders." General asserts that this alleged effort to expand the scope of the bargaining unit to encompass a classification that did not exist when the 1991-1993 collective bargaining agreement was signed somehow

makes the Funds interpretation of the participation agreement "nonsensical" (p. 17). General's argument is difficult to follow. In any event, the Fund is not contending that contributions are due on employees who do not perform duties covered by the 1991 collective bargaining agreement so the audit claim does not undermine the continuing viability of the participation agreement.

Finally, General argues that the participation agreement must have ended because while it "provides for set contributions for 1991, 1992 and 1993, tilt simply does not state what occurs after that date" (p. 18). It is apparent that General does not realize that the Benefit Class 16 contribution rate did not change from 1993 through October 2005 and there was no obligation for General to move to a higher Benefit Class. Thus, the participation agreement did indicate what was to occur after 1993-General had to contribute at the same \$85 Benefit Class 16 contribution rate that did not change through October, 2005.

In addition to the participation agreement, General remained contractually obligated to contribute to the Fund under the certification clause on the monthly bills which required General to reaffirm its obligation to contribute in accordance with the 1991 collective bargaining agreement. While General did not sign the bills and only signed one reporting form in early 1995, it accepted the terms of the certification clause by making monthly payments in accordance with the bills which allowed it to obtain additional benefits for Smith and Swihart.

### C. Equitable Considerations

Even if the Trustees or a court concluded that General's obligation to contribute ended in 1993 and the contributions remitted after that date were paid by

mistake, General's refund request can be denied if the Trustees find that it would be inequitable to return the contributions.

If General's duty to contribute ended in 1993, Smith has been overpaid over \$200,000 in benefits. While it is true that General does not seek to recover any contributions paid on behalf of Smith, this is only because Smith retired in January 1995 and the ten year refund limitation precludes recovery of the 1994 contributions paid on Smith that enabled him to cross the 30 year benefit cliff. General steadfastly maintains that "all pension payments made by it to Central States, on or after December 31, 1993 were based upon a mistake of fact and/or law" and demands a "calculation of the withdrawal liability as of December 31, 1993" (p. 2). Thus if General's position is accepted, the Smith contributions were also necessarily paid by mistake. It is unlikely that the Fund could ever recover the entire overpayment from Smith if General's claim of mistake is accepted. Since the alleged contribution overpayment that would have triggered a benefit overpayment was caused solely by General's error and its failure to comply with its contractual duty to notify the Fund of changes in the labor contract, it is inequitable for General to recover any of the contributions paid to the Fund.

**RECOMMENDATION:** Staff and the Law Department recommend that the Trustees make the following findings for the reasons set forth in this item and conclude that General's contribution payments after 1993 were not made by mistake of fact or law and that it would be inequitable to make the requested refund:

- 1) There was no oral agreement between General and Local 164 that limited General's duty to

contribute to the Fund. Therefore, General had no basis for believing it could limit its contributions to the Fund and none of the contributions paid after 1993 were made by mistake.

2) The participation agreement obligates employers to continue to contribute to the Fund after termination of the union-employer collective bargaining agreement, absent express notice by the employer of termination of the participation or termination of the employer by the Trustees as a result of the employer's violation of Fund policy. Because the required written notice of termination was not submitted to the Fund, General remained contractually obligated to contribute to the Fund through at least November 2, 2005. General also remained contractually obligated to contribute to the Fund under the certification clause on the monthly bills. As a result, the contributions paid by General after 1993 were not paid by mistake but were required to be made by the participation agreement and were required to be made by the certification clause.

3) Even if General had no duty to contribute to the Fund after 1993 and the contributions paid after that date were paid by mistake, General's refund request is inequitable and must be denied.

\*\*\*\*\*

#### ACTION OF THE PENSION BOARD MEETING DECEMBER 14, 2005

After a full discussion, a motion was made, seconded and unanimously carried, upon recommendation of Staff, to make and adopt the findings of fact and that conclusions that are specified on page 12 of

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this minute item, based upon the facts and circumstances (and the reasons and explanations) that are described on pages 1-12 of this minute item and in the attachments.

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**APPENDIX F**

**PARTICIPATION AGREEMENT  
CENTRAL STATES, SOUTHEAST AND  
SOUTHWEST AREAS  
PENSION FUND/HEALTH AND WELFARE FUND  
8550 WEST BRYN MAWR AVENUE  
CHICAGO, ILLINOIS  
PHONE: (312) 693-5300**

THIS AGREEMENT made and entered into on the  
1st day of January 1991  
by and between the Employer and the Union signa-  
tory hereto by their duly authorized representatives.

**WITNESSETH:**

WHEREAS, the Union and the Employer have entered into a collective bargaining agreement which provides for participation in the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND/OR HEALTH AND WELFARE FUND in order to obtain retirement and/or health benefits for employees (classification: \_\_\_\_\_) represented by the Union and employed by the Employer.

NOW, THEREFORE, for and in consideration of the promises and mutual covenants herein contained and subject to the written acceptance of the parties as participants by said Trust Fund(s), the Union and the Employer hereby agree as follows:

1. The Union and the Employer agree to be bound by, and hereby assent to all of the terms of the Trust Agreement(s) creating said CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND/OR HEALTH AND WELFARE FUND, as amended, all of the rules and regulations heretofore and hereafter

adopted by the Trustees of said Trust Fund(s) pursuant to said Trust Agreement(s), and all of the actions of the Trustees in administering such Trust Fund(s) in accordance with the Trust Agreement(s) and rules adopted.

2. The Employer hereby accepts as Employer Trustees the present Employer Trustees appointed under said Trust Agreement(s) and of such past or succeeding Employer Trustees as shall have been or will be appointed in accordance with the terms of the Trust Agreement(s).
3. The Union hereby accepts as Union Trustees the present Union Trustees appointed under said Trust Agreement(s) and all such past or succeeding Union Trustees as shall have been or will be appointed in accordance with the terms of the Trust Agreement(s).
- 4(a). In accordance with the collective bargaining agreement, the effective date of participation in the Pension Fund is January 1, 1991
- 4(b). In accordance with the collective bargaining agreement, the effective date of participation in the Health and Welfare Fund is \_\_\_\_\_
- 5(a). The Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND the sum of \$ 79.00 per week for its bargaining unit Employees pursuant to the terms of the collective bargaining agreement, and only for such Employees, said sum to be increased to \$ 85.00

effective Jan. 1, 1991 increased to \$79.00 per week

effective Jan. 1, 1992 increased to \$83.00 per week

effective Jan. 1, 1993 increased to \$85.00 per week

- 5(b). The Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND the sum of \$\_\_\_\_\_ per week for the bargaining unit Employees pursuant to the terms of the collective bargaining agreement, and only for such Employees, said sum to be increased to \$\_\_\_\_\_

effective \_\_\_\_\_ increased to \$\_\_\_\_\_

effective \_\_\_\_\_ increased to \$\_\_\_\_\_

effective \_\_\_\_\_ increased to \$\_\_\_\_\_

- 5(c). If the Employer signs and enters into a new collective bargaining agreement with the Union, or modifies such current collective bargaining agreement, the Employer must notify the Trust Fund(s) of such contractual change, and further agrees that no applicable Statute of Limitations shall begin to run until such notice of contract change has been sent to the Fund(s).

6. The Employer and Union represent to the Trustees that payments will be made only on behalf of Employees in the collective bargaining unit, excluding, by way of example but not limitation, self-employed persons and supervisors, among others.
7. This Agreement shall continue in full force and effect until such time as the Employer notifies the Fund(s) by certified mail (with a copy to the Local Union) that the Employer is no longer

under a legal duty to make contributions to the Fund(s). The Employer shall set forth in the required written notice to the Fund(s) the specific basis upon which the Employer is relying in terminating its obligation to make contributions to the Fund(s). The Employer expressly agrees and hereby acknowledges by the signing of this Agreement that its obligation to make contributions to the Fund(s) shall continue until the above-mentioned written notice is received by the Fund(s) and the Trustees acknowledge the Employees termination in writing.

8. Payments of Employer contributions are to be mailed to the American National Bank and Trust Company of Chicago, LaSalle at Washington, Chicago, Illinois 60690, or to such other depository as the Trustees may designate.
9. On or before the fifteenth (15th) day of the month after the date of a bill, the Employer must report to the Fund(s) any changes in the status of members that are applicable to the period billed. Failure of an Employer to file a written report, on a form provided by the Fund(s) within said period constitutes automatic acceptance of and liability for the amounts billed. After said period has expired, an Employer will not be able to receive credit for any changes of employee status, regardless of actual terminations, leaves of absence, sick leaves, layoffs or other charges. No Statute of Limitations made applicable as a result of any change in Employee status shall begin to run until said report of such change has been delivered to the fund(s).

10. In the event of a delinquency on the part of the Employer, interest will be charged at a rate in accordance with the Trust Agreement(s) per annum on the outstanding balance. Any subsequent payments on delinquencies will be applied first to any interest due and then to the oldest unpaid balance.
11. If an Employer signs a collective bargaining agreement through an Employer Association establishing participation in the Pension and/or Health and Welfare Fund, the respective Association's signature shall be binding on the respective Employers of the Association.
12. This Agreement and any interpretation thereof will be governed according to the law of the State of Illinois.
13. For purposes of this Agreement the following definition will govern:
  - (1) "Employer", as used herein, shall mean any Employer who is bound by a collective bargaining agreement with the Union and agrees to be bound by the Trust Agreement (Pension and/or Health and Welfare Fund), or any Employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by the Trust Agreement (Pension and/or Health and Welfare Fund).
  - (2) "Employee", as used herein, shall mean:
    - (a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least

thirty (30) days who is employed under the terms and conditions of a collective bargaining agreement as entered into between an Employer and a Union, and on whose behalf contributions are required to be made to the Pension and/or Health and Welfare Fund by the Employer; or

- (b) All persons employed by the Union, as herein defined, upon being proposed by the Union and after acceptance by the Trustees as hereinafter defined; and as to such Union personnel the Union shall be considered an Employer, solely for the purpose of contributions, and shall, on behalf of such employees, make or be presently required to make contributions to the Pension and/or Health and Welfare Fund at the times and at the rate of payment equal to that required by any other Employer who participates in the Trust Fund for the same benefits; or
- (c) All persons employed by CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, or CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND upon acceptance by the Trustees as hereinafter defined; and as to such personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of the Agreement(s) and Declaration(s) of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Trust(s) at the

times and at the rate of payment equal to that required by any other Employer who participates in the Trust Fund(s) for the same benefits

- (d) In all instances the common law test, or the applicable statutory definition of master-servant relationship shall control the Employee status.
  - (e) The continuation of Employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.
- (3) Hours worked, for purposes of this Agreement, shall mean time of employment for which an Employee is entitled to wages and includes, but is not limited to, show up time, overtime and vacation time. Hours worked shall also include payment of wages which is the result of any National Labor Relations Board action, grievance procedure, or proceeding which resulted in the payment of back wages to an Employee by the Employer. Additionally, the hours worked shall also include any period for which the Fund(s) is (are) obligated under the Employee Retirement Income Security Act of 1974 to award credited service to an Employee.
- (4) Delinquent Employer, for purposes of this Agreement, shall mean an Employer whose contribution payment is not received on the fifteenth day of the month after the date of a bill.
14. It is expressly agreed to by the Employer (its successors, administrators, executors and as-

signs) who is or may become a party to the collective bargaining agreement (including all renewals and extensions thereof) referred to in the second paragraph of this Participation Agreement that any and all disputes arising between the Employer and the Fund(s) concerning the application and/or interpretation of the collective bargaining agreement's provision for contributions to said Trust Fund(s); this Participation Agreement; or the Fund(s) Trust Agreement as it relates to the Employer's obligations to submit contributions to the Fund(s) shall be submitted for resolution to the Trustees of the Fund(s) and need not be subject to the grievance-arbitration clause, or any other adjudicatory clause or clauses of the collective bargaining agreement. It is understood that in the event there remain any unresolved disputes between the parties to this Agreement after exhausting the procedure set forth in this paragraph, either party is free to seek appropriate judicial relief.

15. This Agreement is not binding upon the Fund(s) until accepted by the Trustees and confirmation of same is sent out over the signature of an authorized Fund(s) representative, normally the Executive Director.

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IN WITNESS WHEREOF said Employer and Union have caused this Instrument to be executed by their duty authorized representatives, the day and year first above written.

GENERAL MATERIALS INC.

EMPLOYER

2995 Brooklyn Road, Jackson, MI 49203

COMPLETE ADDRESS OF EMPLOYER

FEDERAL EMPLOYER NUMBER

BY /s/ [Illegible]

TRUCK DRIVERS UNION LOCAL 164  
AFFILIATED WITH INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS

UNION

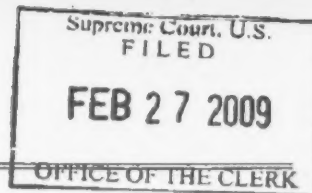
BY /s/ [Illegible]

If Employer is signed to Group Contract, give name of such Contract: \_\_\_\_\_

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(2)

No. 08-962



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**In The  
Supreme Court of the United States**

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**CENTRAL STATES, SOUTHEAST &  
SOUTHWEST AREAS PENSION FUND,  
and HOWARD MCDUGAL, Trustee,**

*Petitioners,*

**v.**

**GENERAL MATERIALS, INCORPORATED, d/b/a  
WHOLESALE MATERIALS COMPANY,**

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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Post Office Box 787  
Jackson, Michigan 49204  
(517) 787-4100**

***Counsel for Respondent*      *Dated: February 27, 2009***

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**COUNTERSTATEMENT OF THE**  
**QUESTIONS PRESENTED**

1. Whether the Court of Appeals correctly ruled that a Participation Agreement signed contemporaneously with a Collective Bargaining Agreement ceases to obligate the Employer to make pension fund contributions after the termination of the Collective Bargaining Agreement?
2. Whether any actual conflict exists between the Seventh Circuit and the Sixth Circuit or whether the existing rulings can be distinguished on the facts in the respective cases?
3. Whether, even if there were a conflict in the Circuits, there was a separate independent basis for the dismissal of the lawsuit based on the expiration of the applicable statute of limitations?
4. Whether the Court of Appeals correctly declined to apply the arbitrary and capricious standard to its review of Petitioner's Claims relative to a Participation Agreement which was of no force or effect and which did not obligate Respondent to make any contributions?

**RULE 29.6 STATEMENT**

Pursuant to Rule 29.6, Respondent General Materials, Inc., is a Michigan corporation and is not a subsidiary or affiliate of a publicly owned corporation. There is no publicly owned corporation, not a party to this appeal, which has a financial interest in the outcome of this case.

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PROCEEDINGS BELOW

Suit was filed in the Northern District of Illinois seeking an audit and contributions allegedly due to Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States"). Respondent General Materials, Inc. ("General Materials") in response to a pre-filing audit request indicated that its last collective bargaining agreement ("CBA") terminated on December 31, 1993; that it had no employees for which contributions were due other than Roy Swihart ("Swihart"); and that contributions were made for Swihart after the termination of the CBA pursuant to an oral agreement with Teamsters Local 164. Upon Respondent's Motion for change of venue, the case was transferred to the Eastern District of Michigan.

Central States initially sought contributions for certain individuals other than Swihart and thereafter filed a first amended complaint seeking contributions for additional individuals. Central States subsequently filed a second amended complaint dropping the claims for contributions for certain employees, but then adding claims for contributions for certain additional employees. Central States' claims for contributions varied from as high as \$656,769.00 to as little as \$220,000.00, (less interest, attorney fees and other statutory damages).

The parties simultaneously filed motions for summary judgment.<sup>1</sup> The District Court held that the conduct of the parties indicated that no one believed that a CBA was in place after the termination of the CBA on December 31, 1993. The District Court held that, applying Michigan's six year statute of limitations, all of Central States' claims were time barred (R.61, p. 10, Apx pg 194).

Both parties appealed to the Sixth Circuit Court of Appeals, which affirmed the District Court's ruling. The Sixth Circuit further explained that neither the 1991 participation agreement nor the certification clause obligated General Materials to contribute after the contemporaneously signed 1991 CBA was terminated. Petitioner subsequently sought rehearing and rehearing en banc and its requests were denied on October 29, 2008.

### COUNTERSTATEMENT OF THE CASE

General Materials is a small lumberyard in Jackson, Michigan, founded in 1952 by Fred Schmid ("Schmid"). The company is now run and owned by his son-in-law, Andrew Woell ("Woell"). Schmid passed away during the pendency of the appeal. Central States is a multiemployer fringe benefit fund that receives contributions pursuant to labor agreements between the employers and local unions

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<sup>1</sup> Respondent filed a counter-claim for a refund of contributions made for Swihart from 1994 to 2005. That counter-claim was dismissed by the District Court and the dismissal was affirmed (although not explicitly discussed) by the Court of Appeals. No cross-petition for writ of certiorari is being filed relative to that claim.

affiliated with the International Brotherhood of Teamsters ("IBT").

As early as December 29, 1968, General Materials was subject to a collective bargaining agreement ("CBA") with IBT Local 164, ("Local 164" or "the union"). General Materials thereafter entered into a succession of IBT contracts. Each time that a new CBA was signed, General Materials and Local 164 also contemporaneously signed a participation agreement ("PA").

On December 17, 1991, General Materials and Local 164 signed their last CBA with effective dates of January 1, 1991, through December 31, 1993 (R.34, Cover page of Ex. E, Apx pg 505). The last PA was signed contemporaneously with that CBA.

On October 21, 1993, General Materials terminated the 1993 CBA, effective December 31, 1993. As of December 31, 1993, all of General Materials' employees who were Union members had retired and were drawing pensions from Central States except for two, James Smith ("Smith") and Swihart. After the termination of the CBA, General Materials continued to deduct union dues from the paychecks of those two employees only and remit the same to the Union and continued to make pension payments to Central States on their behalf.

General Materials believed that Schmid, as General Materials' representative, entered into an agreement with Local 164 whereby General Materials would continue to make contributions to Central States and to the Welfare Fund on behalf of

Smith and Swihart until each of them retired. In exchange, Local 164 would take no further actions to organize General Materials. Schmid, shortly after this lawsuit was filed, signed an affidavit to this effect (R.35, ¶ 6 of Schmid Aff., Ex. T, Apx pg 578-579). Unfortunately, Schmid's physical and mental condition deteriorated during the course of the litigation such that when his deposition was taken on September 7, 2005, he had no memory one way or the other of having entered into any such agreement or even having signed the affidavit. (R.35, ln. 16 p. 27 to ln. 4, p. 28 of Schmid's Dep., Ex. U, Apx pg 581). He has since passed away.

On July 21, 1994, Local 164 acknowledged in writing that there was no CBA in effect. No unfair labor practice ("ULP") charges were ever filed. Neither Local Union 164 nor General Materials have any records indicating that any bargaining took place after termination.

On December 31, 1994, Smith retired and, thereafter, began drawing a pension from Central States. Each month, Central States sends a form to employers in which the employer is supposed to report any changes in employee status and sign regarding the same. From January 1, 1994 through October 31, 2005, a General Materials employee signed only one (1) of those forms to show that Smith had retired as of 12/31/94 (R.34, Ex. K, Apx pg 530).

After 1991, there was never any new CBA or PA signed between General Materials and Local 164. General Materials hired over forty employees thereafter. These employees were not members of

Local 164. For each such employee, General Materials never treated them as being covered by any CBA or PA.

From January 8, 1992, to April 6, 2000, there was no evidence that Central States reviewed the status of the terminated CBA, either by inquiring with Local 164 or General Materials. Thomas Baxa ("Baxa"), Division Manager, Contributions Receivable, for Central States prior to 2004, testified on deposition that twice a year he would run a report which identified expired contracts and would send a letter to the local union advising them of the same (R.41, p. 7, ln. 9 to p. 8, ln. 11, Baxa's Dep., Ex. F, Apx pg 849). Although the CBA expired on December 31, 1993, and its records so indicated, Central States did not contact anyone until April of 2000, regarding the expired contract. Baxa had no explanation regarding why that had never happened prior to 2000. He also testified that he was not aware of any CBAs that had been purportedly renewing pursuant to an evergreen clause for seven to ten years. (R.41, p. 15, ln. 3 - 6, Baxa's Dep., Ex. F, Apx pg 851).

As of October 31, 2005, General Materials ceased paying any further voluntary contributions to Central States for Swihart. On November 3, 2005, General Materials filed a request for refund with Central States based upon the fact that the Union had denied there was ever any oral agreement for General Materials to make voluntary contributions without a CBA in effect. The refund request was denied by the Trustees of Central States on December 14, 2005.

Based on the vesting requirements of the Central States Pension Plan, Swihart is the only individual employed at General Materials, from December 31, 1994 on, who will ever be entitled to collect any pension benefits from Central States. Throughout the course of these proceedings, General Materials has indicated that, to the extent Swihart's pension benefit is reduced, General Materials would cover the difference between what he would have received if he retired with 30 years of service and what he ultimately receives as a pension from Central States.

In regard to Smith, after the Court of Appeals' decision, Central States unilaterally reduced his pension from \$2,000 to \$486.50 per month and has threatened to sue him to recover alleged overpayments in the amount of \$249,727.50. Smith has retained separate counsel and an administrative appeal of Petitioners' decision has been filed by Smith.

No evidence was presented suggesting that any employee or former employee of General Materials, other than Swihart and Smith, is in any way impacted by the decisions in this case. Likewise, no evidence was presented suggesting that the decisions in this case will have any impact on any other retirees currently drawing pensions from Central States.

## REASONS FOR DENYING THE WRIT

- I. **The Court Of Appeals Correctly Ruled That A Participation Agreement Alone Could Not Support General Materials' Obligation To Contribute When The Contemporaneously Executed Collective Bargaining Agreement Had Been Terminated.**

The Sixth Circuit correctly affirmed the ruling of the District Court that no contributions are due from General Materials to Central States. The Court of Appeals went a step beyond the District Court, which based its ruling in part on Michigan's six year statute of limitations for contracts, and ruled that neither the 1991 PA nor any certification clause(s) on monthly billings obligated General Materials to make contributions after the 1991 CBA was terminated. This ruling is correct and, for that reason, the petition for certiorari should be denied.

Central States brought the action pursuant to 29 U.S.C. § 1132(g)(1), alleging that General Materials failed to make contributions as required under the terms of the plan and the CBA. Section 1132(g)(1) requires an employer to make contributions only to the extent not inconsistent with law. Payments which are illegal under 29 U.S.C. § 186 are an exception to an employer's obligation under § 1132(g)(1). 29 U.S.C. § 186 provides:

- (a) it shall be unlawful for any employer or association of employers... to pay, lend or

deliver, or agree to pay, lend, or deliver, any money or other thing of value.

- (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
- (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

However, § 186(c)(5) provides that:

The provision of this section shall not be applicable...with respect to money or other things of value paid to a trust fund established by such representative...Provided...(B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer.

Numerous Sixth Circuit cases recognize that estoppel cannot supply the written agreement required by § 186(c)(5). In Merriman v. Paul F. Rost

Electric, Inc., 861 F.2d 135 (6<sup>th</sup> Cir. 1988), the Court noted:

This Court is aware that a literal construction of section [186(c)(5)] effectively forces pension funds, which are third-party beneficiaries of labor agreements, to be more vigilant as to the formalities of execution than are the parties to those agreements. However, what disparity may exist in this regard derives from the express and unmistakable terms of Congress mandate. Id. at 139.

Thus, the Sixth Circuit has concluded that there must be a written contract, signed by the employer, which sets out the employer's obligation to make contributions. This concept makes legal sense and is recognized in other circuits. For example, as the Ninth Circuit observed in Sheet Metal Workers v. West Coast Sheet Metal Company, 954 F.2d 1506 (9<sup>th</sup> Cir. 1991):

A contract to contribute to a trust fund of a Union with which [the employer] has no ongoing collective bargaining relationship makes no sense. The trust fund provisions have no legal effect when the Union is no longer the certified representative of [the employer's] employees. Id., at 1509.

In the matter presently before the Court, Central States contended that the 1991 PA was

sufficient to provide a "contract" as required by 29 U.S.C. § 186(c)(5)(B) and that, in essence, General Materials is estopped from denying the existence of an agreement to make contributions, since it never specifically terminated the PA. The settled, consistent law of the various circuits and the specific, undisputed facts in this case indicate that there was no contemporaneously signed CBA in effect and that, as a result, no further contributions are due from General Materials.

In Firesheets v. A.G. Building Specialists, Inc., 134 F.3d 729 (5<sup>th</sup> Cir. 1998), the employer was a party to a CBA requiring contributions to a benefit trust fund. In 1984, the employer advised the union local of its desire to terminate the CBA. Id., at 730. The parties met to negotiate a new agreement but no agreement was ever prepared or signed. Id. From 1984 forward, the employer solely set, determined, and modified the terms of employment for its employees with no input from the union. Id. The employer continued to make voluntary contributions to the trust fund on behalf of some of its employees for approximately ten years after the expiration date of the original agreement. Id. Beginning in 1992, contributions were made for only one employee until the last contribution was made in 1994. Id. During this time, the employer continued to file contribution reports and complied with changes made in the contribution rates. Id.

The trust funds argued that 1) the original CBA did not terminate; or 2) a new CBA was reached; or 3) Employer was bound by its conduct to continue making contributions. The District Court

rejected all three arguments and was affirmed by the Fifth Circuit. Id., at 731. The Court of Appeals held that the original contract terminated by its own terms and that submission of contribution reports was insufficient to create a new CBA. The Fifth Circuit noted that the employer hired nonunion employees, set wages, and made trust fund contributions only for employees who asked for contributions. The Court found these actions to be inconsistent with any intent to be bound by a new agreement.

The facts in Firesheets are analogous to those in the instant dispute, in that General Materials never acted in a manner that was consistent with having a CBA in place. As such, only the PA could be interpreted as providing the basis for continuing contributions. However, the contribution obligation of the PA is wholly dependent on the existence of a contemporaneously signed underlying CBA. In numerous provisions, the PA refers to the existence of a CBA. By virtue of its own language, the PA is meaningless without the existence of an underlying CBA. This is underscored by the problem that Central States had in this case of trying to define job classification(s) which existed after the termination of the CBA, but which simply did not exist at General Materials in 1993. Since there is no CBA in existence, Central States attempted to argue what *might* have happened over the ten-year period when there was no CBA and what the union *might*, or *might not* have done. Such an analysis is nonsensical.

This situation is contrasted with the case upon which both parties relied in front of the Sixth Circuit, Central States v. Behnke, 883 F.2d 454 (6<sup>th</sup> Cir. 1989). In Behnke, *after* the CBA expired, the Union and Behnke Trucking signed two new agreements. Id., at 457. One was a form PA, undoubtedly similar to the one in this case. The other was a Fringe Benefits Interim Agreement ("Interim Agreement"), which obligated the employer to pay "whatever rate is required to maintain" health and welfare benefits for Local 34..." Id., at 461. The Interim Agreement also specifically stated that the parties were signing it as a temporary agreement, to permit and require the new fringe benefits, while and until the full CBA was prepared and executed in final form. Based on the Interim Agreement and the PA signed at the same time, the Court held that Behnke was required to contribute up until the date a new CBA was signed.

The situation in Behnke is very different from the facts here. Here, there was no interim or any other agreement which was effective after 1993. The PA in Behnke was only of importance because it was signed *at the same time* as the Interim Agreement. As the District Court observed in rendering its opinion in this matter:

...in Behnke, the parties were in between collective bargaining agreements at all relevant times. In this case, the parties never entered into another CBA after the 1991 agreement, which expired by its terms on the last day of 1993. (R.61, p. 8, Apx pg 192).

The Court of Appeals correctly ruled that the PA did not extend, by its own terms, beyond 1993. The PA was insufficient to require continuing obligations for over ten years after the termination of the CBA in 1993. The ruling of the Court of Appeals is correct and the petition should be denied.

## **II. No Conflict Exists Between The Rulings Of The Seventh Circuit And Sixth Circuit Courts Of Appeal.**

Petitioner relies on an asserted conflict between the Sixth Circuit and the Seventh Circuit, citing two cases, one published and one unpublished. Both cases are distinguishable on the facts and indicate the lack of an actual conflict.

First, Petitioner cites Central States Pension Fund v. Schilli Corp., 420 F.3d 663 (7<sup>th</sup> Cir. 2005). The central issue in that case was whether the decertification of a union acted, as a matter of law, to terminate the employer's obligation to contribute under a PA. Central States argued that it did and for that reason, there was a partial withdrawal from the pension plan in the year of the decertification, with a corresponding withdrawal liability. The Employer argued that there was no withdrawal until a few months later in 1998 when Central States was notified of the decertification. The reason for the controversy between the parties was because of the difference in the withdrawal liability which was higher in 1997, (when Central States contended that there was a partial withdrawal), than in 1998 (when the Employer contended the withdrawal took place).

The issue was arbitrated, as provided by statute, and the arbitrator affirmed the Employer's position.

Petitioner was put in the interesting position of advocating the exact opposite of the position it has taken throughout this litigation. In short, it contended that without a valid CBA, a PA has no force or effect. *Id.*, at 669. The Seventh Circuit noted various additional arguments that Central States could have made and concluded by stating that its limited holding was that: "the decertification of Local 878 did not terminate [the employer's] obligation to contribute, for withdrawal liability purposes, by operation of law." *Id.*, at 672.

Central States attempts to stretch the limited holding in Schilli to stand for the proposition that the obligation to contribute under a PA continues forever, regardless of whether a CBA exists. As set forth above, the holding in Schilli was limited to the issue of when withdrawal liability existed and not the issue in the case at bar of whether the obligation under a PA would continue for some twelve years after the termination of the contemporaneously executed CBA.

Second, Petitioner cites Central States Pension Fund v Depew Development, Inc., 172 F.3d 52, 1998 WL 84642 (unpublished decision)(7<sup>th</sup> Cir. 1998). In that unpublished decision, the employer engaged in a number of attempts to avoid its obligations to Central States, including setting up a subsidiary that had only one union employee, while keeping all of its other employees in another corporation. The central basis for the Seventh

Circuit affirming the District Court's finding that contributions were owed to Central States for more than just the one employee, was that there was still a CBA in place that was renewing on a year-to-year basis. *Id.*, at 15 - 17. Thus, the PA could be read together with the unexpired CBA to require continued contributions.

The second basis for the holding was that a separate PA signed by the employer in 1990, (signed without the contemporaneous execution of a CBA), could, by itself, support an obligation to contribute without an underlying CBA. Key to this holding was the timing of the signing of the various agreements. The Employer signed a pre-existing CBA in 1985 and it ran from 1984 to 1987. In 1985 it also contemporaneously signed a PA. In 1990, the Employer signed a new PA with the Union which obligated it to make different and higher contributions than the 1985 PA. No new CBA was signed until 1993. What the Seventh Circuit held, which is completely consistent with the holding of the Sixth Circuit in the matter presently before this Court, was that, based on the timing and specific facts in that case, the 1990 PA constituted a separate obligation to make contributions on behalf of its employees.

Petitioner fails to observe that a separate, subsequent PA was signed by the employer in Depew Development, in contrast to General Materials' situation where the CBA was explicitly terminated in 1993 so there was no question of an evergreen clause and, thereafter, no additional PA was signed. The key to the Sixth Circuit's holding, and what

makes it consistent with the Seventh Circuit's holding in Depew Development is that in the case at bar the CBA and the PA were executed contemporaneously and one could not be read without reference to the other. In such a case, no other conclusion could be reached, but that termination of the CBA terminates the obligations under the PA. Thus, contrary to Petitioners' assertions, there is no conflict in the Circuits and the petition should be denied.

### **III. Even If A Circuit Conflict Existed, This Case Would Present A Poor Vehicle For Resolving It.**

Petitioners argue that the Supreme Court should grant its petition because the Sixth Circuit's holding will have a negative effect on the Petitioners and will have a widespread impact on retirees. Nothing could be further from the truth. As set forth above, the facts in this case indicate that, for in excess of ten years, Central States simply ignored General Materials and was happy to continue taking the contributions for one employee. From the time that Central States began the litigation in 2004, it was clear to Respondent that Central States was dealing with a weak factual scenario and using its size and power in an attempt to force General Materials into paying contributions for employees that would never draw a pension from Central States. In effect, Central States was seeking to increase the size of its dwindling coffers without any corresponding increase in its pension liability.

The resolution of this case has no effect on anyone except General Materials, Swihart, and Smith. There will be no widespread impact. Arguably, Central States is in a better position now than it would have been if it had prevailed, because it has unilaterally reduced its obligation to pay pension benefits to Smith and has indicated that, in paying a pension to Swihart, it will not take into account any contributions after January of 1994, (which contributions it also refused to refund to Respondent). If the Supreme Court granted the Petition and Central States ultimately prevailed, the amount of contributions due from General Materials would be less than its continuing obligation to Smith alone. For these reasons, the petition should be denied.

**IV. If There Were A Conflict Between The Circuits, Granting The Writ Would Serve No Practical Purpose, Since The Statute Of Limitations Provides A Separate And Independent Basis For Dismissal Of Petitioners' Claims.**

The District Court correctly held that Central States should have known by March of 1995 that underpayments were being made and therefore its cause of action accrued in March of 1995. The District Court further held that applying Michigan's six year statute of limitations, all of Central States' claims were time barred (R.61, p. 10, Apx pg 194). In Michigan United Food v. Muir Company, Inc., 992 F.2d 594, 599-600 (6<sup>th</sup> Cir. 1993), the Court held that the pension fund's claims were barred by the statute of limitations when "the facts in this case show that

the Funds, by conducting an internal audit using information already within their possession, had the ability to discover probable discrepancies and underpayments at any time after the employer's monthly reports were received." The Michigan United Court noted that in defining the concept of due diligence, the Court had "looked to what event should have alerted the typical lay person to protect his or her rights." Id., at 600. The Court noted that the Welfare Fund was hardly in the position of a "typical lay person," and instead, "were experts in the accounting methods required to detect the kind of reporting errors involved in this case." Id., at 600. Thus, the Court concluded that, "information sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a party's duty to inquire into the matter with due diligence." Id., at 600.

Here, the District Court found that Central States had information available to it which gave rise to a duty to inquire into the matter with due diligence. Central States' self-serving assertion that it neither knew, nor could have known, of any underreporting prior to 2004 defies common sense. The District Court's ruling on this issue was correct, was not disturbed by the Court of Appeals, and provides an alternative basis for reaching the same result as the Sixth Circuit Court of Appeals. For that reason, the petition should be denied.

**V. The Trustees Were Never Asked To Determine The Issue Of Whether Contributions Were Due, And No Error Was Committed Relative To The Review Of That Issue.**

Petitioner contends that the Sixth Circuit committed error by not reviewing the decision of the Central States' Trustees under the arbitrary or capricious standard of review. No error has been committed as the Sixth Circuit correctly held that, as a matter of law, the PA could not support the existence of an obligation to contribute after the termination of a contemporaneously executed CBA.

Central States filed suit seeking an audit and contributions. Prior to filing suit, its Trustees never made any determination of whether contributions were due. After litigation had been underway for some time, General Materials submitted its request for a refund of contributions paid for Swihart within the preceding 10 years. General Materials did not invoke or rely upon the PA in making its request as it believed that its request should be reviewed by the Trustees pursuant to the Trust Agreement. Contrary to Petitioner's assertions, General Materials never submitted to the Trustees the issue of whether any contributions were owed after December 31, 1993.

The Trustees subsequently denied the request for refund and it is this denial of the request for refund that is relied upon by Petitioner as the basis for its argument that the arbitrary or capricious standard should apply to the entire case, rather than

just to the determination that no refund of contributions was due pursuant to Respondent's counter-claim.

The District Court said that, even if the arbitrary and capricious standard were applied, the finding by the Trustees was arbitrary or capricious as any claim was barred by the six year Michigan statute of limitations. The holding of the Court of Appeals was that the PA had no effect after the CBA was terminated, effective December 31, 1993. As the PA was not in effect, its provisions dealing with the consideration of issues under the PA were of no effect. This argument was nothing more than an attempt by the Petitioners to bootstrap their way to a better standard of review. The Court of Appeals correctly refused to consider this argument and its refusal was consistent with its overall holding. For this reason, the petition should be denied.

### CONCLUSION

For all the foregoing reasons, the Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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No. 08-962

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IN THE  
**Supreme Court of the United States**

CENTRAL STATES, SOUTHEAST  
AND SOUTHWEST AREAS PENSION FUND  
and Howard McDougall, Trustee,  
*Petitioners,*

v.

GENERAL MATERIALS, INC.,  
d/b/a WHOLESALE MATERIALS CO.,  
a Michigan Corporation,  
*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Sixth Circuit

**REPLY BRIEF FOR THE PETITIONERS**

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
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**REPLY BRIEF FOR THE PETITIONERS**

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**I. THE RESPONDENT CONCEDES THAT  
THE COURT OF APPEALS "REFUSED"  
TO APPLY THE ARBITRARY AND  
CAPRICIOUS STANDARD OF REVIEW  
MANDATED BY THIS COURT'S PRIOR  
DECISIONS.**

The district court indicated that the "parties agree that the arbitrary and capricious standard [of review] applies to the Trustees' decision that General owed contributions from 1993 [to 2005]" under the Participation Agreement drafted by the Trustees. (Pet. App.

17a). Despite the parties' agreement that the arbitrary and capricious standard applies, the Respondent concedes in its brief that the "Court of Appeals . . . refused to consider th[e] argument." (Br. in Opp. 20). The Court of Appeals' refusal to apply the arbitrary and capricious standard directly conflicts with this Court's decisions in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-111 (1989) and *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 n.8 (1985), which establish that judicial review must be deferential where the trust document gives the Trustees discretion to interpret plan documents like the Participation Agreement drafted by the Trustees. Had the correct standard of review been applied, the Trustees' decision would have been upheld because their minutes indicate that they relied upon decisions from other courts that establish that the duty to contribute continues under the very same Participation Agreement even if the collective bargaining agreement and the bargaining relationship have ended. *Central States Pension Fund v. Schilli Corp.*, 420 F.3d 663 (7th Cir. 2005); *Central States Pension Fund v. Marine Contracting Co.*, 878 F.Supp. 1176, 1178 (N.D. Ill. 1995); *Central States Pension Fund v. Dussault Moving Co.*, 871 F.Supp. 1046 (N.D. Ill. 1995). Therefore, the Petition should be granted and the case should be remanded for reconsideration under the arbitrary and capricious standard of review.

The Respondent's Brief correctly represents that sixty-six year old James Smith, the retiree who has been catastrophically impacted by the Court of Appeals' decision that has forced the Fund to slash his monthly pension benefit from \$2,000 to \$486.50 and who now faces liability to the Petitioners for a \$250,000 overpayment, "has retained separate legal

counsel and an administrative appeal of Petitioners' decision has been filed." (Br. in Opp. 5). Smith's appeal to the Trustees was not received by the Petitioners until two days after the Petition was filed. In the event Smith's appeal is denied by the Trustees and Smith files suit, the court will certainly apply the arbitrary and capricious standard of review to the Trustees' decision under *Firestone Tire and Rubber Co.* and *Central Transport, Inc.* Application of a standard of review in a suit concerning the meaning of a document created by an ERISA fund (like the Petitioners' Participation Agreement) that is more deferential when the suit is filed by a participant against the fund than when the suit is filed by a fund against an employer, is illogical and creates risk of inconsistent results.

The Respondent's assertion that its appeal to the Trustees for a contribution refund "never submitted to the Trustees the issue of whether any contributions were owed after December 31, 1993," is plainly erroneous. (Br. in Opp. 19). Respondent fails to mention that it never made this argument in its Court of Appeal's brief and it overlooks the district court's determination that "[t]he parties agree that the arbitrary and capricious standard applies to the Trustees' decision that General owed contributions from 1993 [to 2005] as well as the Trustees' denial of General's request for a refund." (Pet. App. 17a). Moreover, ERISA prohibits a contribution refund unless the post-1993 contributions were paid by mistake of law or fact. 29 U.S.C. § 1103(c)(A)(ii). To satisfy the statutory "mistake" requirement, the Respondent had to try to convince the Trustees that the post-1993 contributions were not owed and as a result, the Respondent devoted two pages of its appeal to the issue of whether it was obligated to

contribute under the Participation Agreement. Thus, the Respondent's appeal necessarily asked the Trustees to decide whether the Participation Agreement obligated the Respondent to contribute after 1993. Having submitted the issue to the Trustees, the Respondent was not entitled to the *de novo* review of the issue it received from the Court of Appeals.

## II. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE SEVENTH CIRCUIT'S *SCHILLI CORP.* DECISION.

The Respondent asserts that *Central States Pension Fund v. Schilli Corp.*, 420 F.3d 663 (7th Cir. 2005) is distinguishable because it was a withdrawal liability case and the issue was the date the employer withdrew from the Fund, not whether the employer owed additional contributions to the Fund. However, the issue in *Schilli Corp.* and this case is identical because ERISA defines the date of a withdrawal as the date the employer "permanently ceases to have an obligation to contribute under . . . [its] collective bargaining agreement." 29 U.S.C. § 1385(b)(2)(A)(i). As a result, the Seventh Circuit indicated that in order to prevail, the Fund "must show that Truck Transport . . . ceased to have an obligation to contribute to the fund" when the bargaining relationship and collective bargaining agreement ended by virtue of the decertification. 420 F.3d at 668. The Seventh Circuit held that resolution of this controlling issue turned on the meaning of the very same duration clause of the Participation Agreement.

Ultimately, the Seventh Circuit held that the Participation Agreement obligated an employer to continue to contribute after the collective bargaining

agreement terminated and the bargaining relationship had been severed, solely because the employer had not provided the written notice of termination to the Fund that is required by the Participation Agreement. On the other hand, the Sixth Circuit held that the same duration clause was surplusage and the Participation Agreement terminated without the required written notice because the collective bargaining agreement and bargaining relationship had terminated. The clear conflict between this case and *Schilli Corp.* should be resolved by this Court to insure that there are no more employees like James Smith facing drastic benefit reductions and enormous overpayment claims.

### III. GENERAL'S STATUTE OF LIMITATIONS DEFENSE IS WITHOUT MERIT.

General erroneously asserts that this case is a poor vehicle for resolving the conflict with this Court's decisions as well as the Seventh Circuit's *Schilli Corp.* decision because the Petitioners cannot prevail since the district court alternatively held that the Petitioners' claim is barred by the Michigan 6-year written contract statute of limitations. The district court's ruling that the Petitioners' claim is barred by the statute of limitations cannot possibly apply to the contributions that became due within six years of the filing of this suit in March 2004. *Trustees for Alaska Laborers Health Fund v. Ferrell*, 812 F.2d 512, 517 (9th Cir. 1987) (A fund's claim for each monthly contribution payment accrues as each payment is missed.) Indeed, General conceded that the statute of limitations was only a partial defense in a district court brief, which indicated that "any claim that accrued after March 1, 1998 would arguably still be actionable [but] Central States has refused to limit

its claim to that time period." Thus, at least a portion of the Petitioners' claim will certainly survive the statute of limitations defense.

Further, the selection of the Michigan 6-year contract limitations period was erroneous because the trust agreement indicates that "[i]n all actions taken by the Trustees . . . to collect delinquent contributions from employers . . . the ten-year statute of limitations applicable to actions on written contracts in the State of Illinois shall apply." This Court and the Courts of Appeal have held that contractual provisions establishing a limitations period like the trust agreement provision are enforceable. *Missouri, Kansas & Texas Railway Co. v. Harriman*, 227 U.S. 657 (1913); *Morrison v. Marsh & McLennan Co.*, 439 F.3d 295, 301-02 (6th Cir. 2006); *Northern Regional Med. Center v. Waffle House System Employee Benefit Plan*, 160 F.3d 1301, 1303 (11th Cir. 1998); *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 875 (7th Cir. 1997). In its district court brief, the Respondent asserted that no part of the Petitioners' claim accrued before March 1995. Since suit was filed in March 2004, no part of the Petitioners' claim would be barred by the ten-year statute of limitations.

Moreover, the district court never decided the Petitioners' Fed.R.Civ.P. Rule 37 Motion to Strike, which showed that none of the facts relied upon by the district court in support of its ruling had been disclosed in response to an interrogatory that required the Respondent to identify all facts upon which the limitations defense was based. The Motion to Strike also provided evidence that contradicted each and every fact relied upon by the district court, but these facts were ignored because the district

court overlooked the Motion to Strike. Consideration of these overlooked facts will establish that there is no basis for the assertion that the Petitioners had the requisite knowledge of their claim for the statute of limitations to begin to accrue prior to the Petitioners' audit in 2004.

### CONCLUSION

For the foregoing reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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